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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING

June Term, 1867, and January Term, 1868.

BY JOHN W. SHEPHERD,
STATE REPORTER.

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OFFICERS OF THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.



A. J. WALKER, CHIEF-JUSTICE.

WILLIAM M. BYRD, }
THOMAS J. JUDGE, } ASSOCIATE JUSTICES.

JNO. W. A. SANFORD, ATTORNEY-GENERAL.

JNO. D. PHELAN, CLERK.

HENRY L. TAYLOR, MARSHAL.



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REPORTS
OF
CASES ARGUED AND DETERMINED
AT THE JUNE TERM, 1867.

TUSKALOOSA BRIDGE CO. *vs.* OLMSTEAD.

[BILL IN EQUITY TO ENJOIN INVASION OF FERRY FRANCHISE.]

1. *Constitutional provisions (art. IV, § 2.) as to requisites of amendatory laws.*—The constitutional provision contained in the second section of the fourth article, declaring that “no law, nor any section of any law, shall be revised or amended by reference only to its title and number, but the law or section revised or amended shall itself be set forth at full length,” not only prescribes a rule of legislative procedure, but renders null and void any law which does not conform to its requirements. (JUDGE, J., *dissenting.*)
2. *Same; act of Feb. 3d, 1866, amending charter of Tuskaloosa Bridge Company.*—The act approved February 3d, 1866, entitled “An act to amend an act to incorporate a company to build a bridge across the Warrior river opposite the city of Tuskaloosa, approved January 2d, 1833,” (Session Acts, 1865-6, p. 268.) in failing to set out at length the amended act, contravenes the provisions of the second section of the fourth article of the constitution, and is, consequently, null and void. (JUDGE, J., *dissenting.*)

APPEAL from the Chancery Court at Tuskaloosa.

Heard before the Hon. J. Q. LOOMIS.

THE bill in this case was filed by the appellant, on the 26th March, 1866, against Elisha S. Olmstead and others; and sought to enjoin the defendants from keeping and using a public ferry across the Black Warrior river opposite the city of Tuskaloosa, in alleged violation of the complainant's chartered rights, and to compel an account

of the tolls which the defendants had received from the ferry. The plaintiff was incorporated by an act of the general assembly of this State, approved January 2d, 1833, entitled "An act to incorporate a company to build a toll-bridge across the Black Warrior river opposite the town of Tuskaloosa."—Session Acts, 1833, pp. 86–88. According to the allegations of the bill, the bridge company was organized under the provisions of this act, and erected a bridge across the Warrior river, under the authority conferred on them by their charter, in 1835; which bridge they used, charging tolls as authorized by their charter, until some time in the year 1855, when it became so much worn by use, and being injured by a tornado, that it was deemed unsafe, and was therefore torn down, and a new bridge erected in its stead; and this new bridge was in like manner used by the company until some time in April, 1865, when it was burnt and destroyed by the military forces of the United States, under the command of Brigadier-General Croxton. At the time of the building of their first bridge by the company, there was a public ferry across the river, "a short distance below the site selected for said bridge;" which ferry had been established, many years before that time, under an order granted by the county court of Tuskaloosa county, and which, with all its appurtenances, was purchased by the said bridge company, in the year 1836, from one Reuben Dodson, "he being then the owner, or claiming to be the owner of said public ferry, and to have the right to sell the same." After the removal of the plaintiff's first bridge, and while the company was building their new bridge, "to wit, on the 2d July, 1855," the commissioners' court of the county granted them a license to keep a public ferry across the river, opposite the city of Tuskaloosa, at the foot of the wharf, for the term of ten years; and they complied with the conditions of the act, and established a ferry according to its terms. After the destruction of the new bridge by the military forces of the United States, an act was passed by the general assembly of the State, which was approved by the governor on the 3d February, 1866, and which authorized said bridge company to establish a

public ferry across the river, on the conditions and terms prescribed by said act; and said ferry was established by the bridge company under the provisions of said act. The said act of the legislature, which was set out in full in the bill, may be found in the session acts of 1865-6, (pp. 268-9,) and is in the following words :

“AN ACT to amend an act, entitled an act to incorporate a company to build a bridge across the Warrior river, opposite the city of Tuskaloosa, approved Jan'y 2d, 1833.

“Whereas, as the bridge built under authority of the above recited act was burned, during the late war, by the Federal forces under Brigadier-General Croxton; and whereas, the corporation, soon after the erection of their bridge, by virtue of said authority, did purchase of the then owner the ferry, near the site of the bridge, for the sum of two thousand dollars :

“SECTION 1. *Be it enacted by the senate and house of representatives of the State of Alabama in general assembly convened*, That the above recited act be amended, by additional sections, numbered and worded as follows, which additional sections shall, for all purposes, be deemed and held as a part of the original act, to the same extent, and in the same manner, as if the same had been incorporated therein at the time of its passage :

“SEC. 11. *Be it further enacted*, That said corporation shall be authorized to establish and keep a ferry across the Warrior river, at the sites or landings used by Reuben Dodson, at the time of his sale to said corporation, then the said ferry generally known as Dyer's old ferry, and to charge tolls at the rates fixed by the seventh section of this act; *Provided*, said corporation shall be required to keep up the ferry only at such times as the crossing of the bridge shall be impracticable or unsafe; *and provided further*, That nothing herein contained shall be so construed as to prohibit or restrict the court of county commissioners from the establishment of as many ferries opposite the town of Tuskaloosa, as now regulated by law, as the public convenience may require.

"SEC. 12. *Be it further enacted*, That if the said bridge company shall not, within three years from the passage of this act, in good faith commence the rebuilding of said bridge, and complete the same within five years from said date, the franchise hereby granted shall cease.

"SEC. 13. *Be it further enacted*, That when said bridge is rebuilt, as provided by the preceding section, said bridge company shall be required to keep up the bridges across the ravines on the road now leading from the north end of the bridge to Main street in the town of North Port; *Provided*, That, for that purpose, the court of county commissioners shall authorize said company to charge such reasonable additional tolls at the main bridge as may be just and proper; *and provided, further*, that no increase of tolls shall be allowed on foot passengers."

Approved, February 3, 1866.

The chancellor sustained a demurrer to the bill for want of equity, on the ground that the said act of February 3d, 1866, under which the plaintiff claimed the exclusive franchise of the ferry, was unconstitutional and void; and his decree is now assigned as error.

RICE, SEMPLE & GOLDTHWAITE, with whom was E. W. PECK, for appellant.—It is a well-settled rule, that a court will never declare a statute void, unless the nullity or invalidity of the act be placed, in their judgment, "beyond a reasonable doubt." Though not satisfied of its constitutionality, yet, if not satisfied of its unconstitutionality, it is the duty of the court to uphold it.—See the numerous authorities cited and applied in *Morrison v. Springer*, 15 Iowa R. 347-9; *Lehman v. McBride*, 15 Ohio, 591.

"The constitution, as applied to the legislative department, is a limitation, and not a grant of power."—*Morrison v. Springer, supra*, 342.

The fourth article of the constitution of Alabama relates to the legislative department. By the first section of that article, "the legislative power of this State" is vested in the two distinct branches of the general assembly. By the second section, certain directions or rules are stated, as to the

modes in which that power should be exercised. But there is no provision to the effect, that a failure to observe these directions or rules will avoid any fair exercise of the legislative power. Nor can it be justly claimed, from the language of the constitution, to be "beyond a reasonable doubt" that the framers of the constitution intended that such failure should avoid any fair exercise of the legislative authority. For, if such had been the intention, why was there not a clause inserted, "declaring the act to be void, if this direction be not followed"?—*The People v. The Supervisors of Chenango*, 4 Selden's Rep. 328; *Pim v. Nicholson*, 6 Ohio St. R. 178-180; *Miller v. The State*, 3 *ib.* 475; *Washington v. Page*, 4 Cal. Rep. 388; *Lehman v. McBride*, 15 Ohio Rep. 601; *Rairden v. Holden*, *ib.* 209.

As permanent rules for the proceedings of the two houses, the provisions of said second section of the fourth article of the constitution are important and beneficial, and are adequate to remove the real evils which induced the adoption of these provisions. "The only safeguard against the violation of these rules of the houses is their regard for, and their oath to support, the constitution of the State." The framers of the constitution deemed that safeguard sufficient; or they would have used such language as they used in the 18th section of the same article—"no bill shall have the force of law," unless these rules are complied with in its passage through the two houses.

To treat these provisions as mere rules for the two houses, obedience to which is exacted by their oath to support the constitution, is to free their interpretation from absurdity, contradiction, injustice, or extreme hardship. Although, in a certain sense, they are thus deemed as "directory" only, yet they are to be enforced by the two houses, and will surely be enforced by them, unless a majority shall prove themselves too weak to understand their oaths, or too corrupt to regard their sworn duty. Is it credible, that the framers of the constitution adopted the provisions in question in contemplation of any such case of imbecility or corruption on the part of a majority of the legislative department? Is such the deference paid by the framers of a government, to an independent department thereof, and

to that department to which was entrusted "the legislative power of the State"? To treat these provisions as not directory, but as absolutely imperative in every case, is to resort to an interpretation "most mischievous in practice," involving absurdity, contradiction, increased expenses of legislation, injustice, and extreme hardship, without any practical benefits. It is a settled rule, that when the literal interpretation of a constitution or statute involves such evil consequences, "the courts may deviate a little from the received sense and literal meaning of the words, and interpret the instrument in accordance with what may appear to have been its reason and spirit."—*Brooks v. Hicks*, 20 Tex. Rep. 666. And "the arguments of hardship, irregularity, injustice and inconvenience, will address themselves to the judiciary in constitutional cases, with more force than in regard to ordinary legislative acts; just in proportion as it is more difficult to revise a constitution, or to escape its power, than to amend or to evade a statute."—Sedgwick on Stat. & Cons. Law, 491–493; *Taylor v. Taylor*, 10 Minnesota Rep. 116, *et seq.*

The authorities above cited put it beyond doubt, that the courts are, at least, as fully authorized and required to treat constitutional provisions as directory, as they are to treat statutory provisions as directory, for the purpose of enforcing the reason and spirit of the instrument. The horror of treating a provision of a constitution as directory, must give place, under the authorities, to the sober and calm inquiry, what was the meaning and intent of the framers of the instrument; what is the reason and spirit of the provision in question? Every such constitutional provision should receive "a reasonable, not a technical construction"; such a construction as will be not only more consistent with the objects intended to be accomplished by it, but will be found necessary in the practical business of legislation."—*Lou. & Oldham Turn. R. Co. v. Ballard*, 2 Metcalf's (Ky.) R. 168–9; *Phillips v. Cov. & Cin. Bridge Co.*, *ib.* 219; *Johnson v. Higgins*, 3 *ib.* 566; *Parker v. Parker*, 10 Texas R. 83; *Murphy v. Menard*, 11 Texas R. 676; *Battle v. Howard*, 13 Texas R. 345; *Tadlock v. Eccles*, 20 Texas R. 782; *The State v. Andrews*, *ib.* 230.

In determining what is "a reasonable construction" of the constitutional provisions in question here, the courts should never lose sight of the following considerations : 1. The authority to pass a law, and the "mode" in which that authority may be exercised, are very different things. The usual essentials to the validity of a law "relate to the authority by which, rather than the mode in which laws are to be made." — *Miller v. The State*, 3 Ohio R. 483. 2. The objection to the statute in question here, is not to the authority of the legislature to pass an act containing every provision found in this statute, but merely to the mode in which that undoubted authority has been exercised. 3. The provisions of our constitution, relating to the "mode," were adopted for the first time in this State in September, 1865. Similar provisions had been adopted into the constitutions of some of our sister States, but all this occurred within a period fairly to be called modern ; there was no uniform settled construction prevailing in these States ; Ohio and California clearly held such provisions as directory only, as far back as 1854, and steadily adhere to that construction ; the New York court of appeals, in 1853, without any dissenting judge, announced the same construction.—4 Selden's R. 328. Conceding that some of the other States adopted the opposite construction, the fact is undeniable, that there was a known and clear conflict of judicial decision, as to the meaning of such provisions, at the very time our convention first incorporated them into our constitution. It is impossible, therefore, to hold with any degree of certainty, upon the adjudged cases only, which of these conflicting constructions the framers of our constitution intended to adopt. 4. In this peculiar state of facts and judicial expositions, the argument of the supreme court of California seems unanswerable and decisive. The substance of it is this : The first legislature that met under our constitution, evidently considered the constitutional provisions now under discussion as directory, as is proved by an inspection of a great number of their acts, including the very act assailed in this case. This contemporaneous exposition of the first legislature, composed of many who had participated as members of the convention in forming our con-

stitution, is so significant of the real intention of the convention as to render it quite impossible for the courts to say, beyond a reasonable doubt, that the intention of the convention was to make the provisions in question imperative, and not directory. The natural conclusion from the acts of this first legislature, composed of so many of the framers of the constitution, is, that in adopting the provisions in question, the real intention was to adopt them in the sense and with the construction shown in the cases cited from 4 Selden, 328, and from the Ohio and California Reports.

The objection to the statute in question, that it is in conflict with the 38th section of the 4th article of the constitution, admits of a brief but conclusive answer. The original charter of the appellant did not give it the capacity to apply to a court for, or to accept from a court, the ferry franchise granted by the statute here drawn in question. A natural person could have procured from a court, and have accepted and enjoyed, a ferry franchise. But no corporation can do that, unless enabled by its charter to do it; and this corporation was not so enabled by its charter. This corporation had no capacity to acquire the ferry franchise, under any "general law," or from any court. A special act like the one in question was essential. This special act is "an independent act," conferring upon the appellant a "new" franchise; and to such "independent act," the constitutional provision relied on by appellees, does not apply.—*Davis v. The State*, 7 Maryland R. 151. "It was intended to provide for a particular case, not hitherto provided for," a ferry franchise superadded to a bridge franchise.—15 Ohio R. 209, 603.

The bill was filed here to protect appellant in the enjoyment of a franchise, granted by statute; and is clearly maintainable.—*The Mayor of Columbus v. Rodgers*, 10 Ala. R. 37; *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. R. 40; (*S. C.*) 2 American Railway Cases, 69–77–90.

2. Even conceding the statute in question to be void, the long possession and enjoyment of the ferry privilege by the appellant, entitles appellant to maintain the bill, and

to have the benefit of the injunction. In any point of view, there is error in the decree of the chancellor.—*Ogden v. Lund*, 11 Texas R. 690; *Hurrell v. Ellsworth*, 17 Ala. 576; *Burden v. Stein*, 27 Ala. R. 104.

W. MOODY, and W. R. SMITH, *contra*.—The plaintiff's claim to the exclusive right to the ferry is based on three distinct grounds, each of which is worthless. The license to Dyer & Dodson in 1833, purchased by plaintiff in 1836, requires no comment; and the license granted to plaintiff, in July, 1855, by the court of county commissioners, is no better.—Code, § 701; *Wightman v. Karsner*, 20 Ala. 446; 21 Ala. 772. The act of the legislature, approved February 3, 1866, presents the remaining (and indeed the principal) claim of title on the part of the plaintiff; and this act, it is insisted, is unconstitutional and void, for several reasons, and in several distinct particulars. It is in substance and effect, as its title purports, an amendatory act; but the amended act is not set out in it, as required by the second section of the fourth article of the revised constitution. It embraces two distinct subjects—viz., “to establish and keep a ferry across the Warrior river,” and “to keep up the bridges across the ravines on the road”—while the same section of the constitution requires that “each law shall embrace but one subject”; and each of these subjects is foreign to the title stated in the act. These constitutional provisions are mandatory and imperative, and are equally binding on all the departments of the government. Any other construction would render them nugatory and inoperative.

A. J. WALKER, C. J.—On the 3d February, 1866, an act was approved, which is entitled, “An act to amend an act to incorporate a company to build a bridge across the Warrior river opposite the city of Tuskaloosa, approved January 2, 1833.” The act approved on the 3d February, 1866, consists of a single section, which directs that the act recited in the title “be amended by additional sections, numbered and worded” in a specified manner, and that those additional sections should, “for all purposes, be

deemed and held as a part of the original act, to the same extent, and in the same manner, as if the same had been incorporated therein at the time of its passage." Then follow the three sections, numbered 11, 12 and 13, to be added to the original act. Those sections do, in fact, amend the act of January 2d, 1833. The later act does in fact amend the older. It is represented in its title as an amendment. It declares an express purpose to amend, and directs that the additional sections shall be deemed and held an amendment. It does not set forth the law amended, but refers to it by its title. The question thus arises, whether it contravenes the second section of the fourth article of the State constitution, and if it does, whether it is therefore void.

The language of the constitutional provision is as follows: "No law, nor any section of any law, shall be revised or amended by reference only to its title and number, but the law or section revised or amended shall itself be set forth at full length." In the cases of *Ex parte Pollard*, and *Ex parte Woods*, (39 Ala. 77,) we used the following language, in reference to the meaning and effect of this clause: "It was never intended by the constitution, that every law which would affect some previous statute of variant provisions on the same subject should set out the statute or statutes so affected at full length. If this were so, it would be impossible to legislate. The constitutional provision relates to those cases, where the act is strictly amendatory or revisory in its character. Its prohibition is directed against the practice of amending or revising laws by additions, or other alterations, which, without the presence of the original, are usually unintelligible. If a law is in itself complete, and original in form, it does not fall within the meaning and spirit of the constitution."

The act under consideration most clearly comes within the scope of the clause of the constitution thus construed. It is in form, not original, but amendatory. It is placed in the legal attitude of being incorporated in additional sections in the original act; and its full effect can not be determined, without reference to the original act; for the entire operation of one or more provisions of an act can

not be safely pronounced, without an examination of the others, with which, as parts of a whole, they are to be compared and construed. The act here is not in parallelism with those which, aiming at original legislation, affect some older law upon the same subject, merely because it happens to contain some different provision. The act in question is declared by the legislature to be an amendment. It is named and baptized by its authors an amendment. It falls actually, and by profession, in substance and in form, within the constitutional provision. A judicial exclusion of such an act from the prohibition of the constitution, would practically disregard its mandate. While it remains, it is our duty to enforce it, whether wise or unwise, convenient or inconvenient.

We have given careful attention to the argument, that the clause of the constitution under consideration is a mere rule of legislative proceeding, and does not render void a law not conformable to it. An anxious desire to allow effect to the will of the legislature, and to avoid a seemingly harsh visitation of a rule, the usefulness of which is hardly proportionate to its inconvenience, induced us to prolong our advisement on the case, with the hope of discovering reason or authority which would lead us to the support of that argument. But it still seems to us that the clause raises a question of legislative power, and is not a mere rule for the government of the general assembly in its proceedings. The prohibition is emphatic, that no law shall be revised or amended, except in the mode specified. This is a command, not specially, or professedly, addressed to the legislature alone. It is as general and comprehensive as any prohibition in the constitution. It is binding upon the executive, who approves or disapproves bills, and upon the judiciary, who declare the law, as well as upon the legislature. What warrant can there be, then, for the position, that it is simply a rule for the guidance of the legislature? When the constitution says no law shall be amended, save in a specified manner, can the legislature say a law may be and shall be amended in a different manner? The case is, to our minds, a plain one of irreconcilable conflict between the

paramount law of the constitution and the enactment of the legislature. When such a conflict is clearly presented to the judicial mind, the constitution must prevail.

Similar constitutional provisions are found in several other States; and the decisions, except in California and Ohio, concur in holding contravening acts void.—*People v. Laurence*, 36 Barb. 177; *Sharp v. May*, 31 Barb. 572; *Brewster v. City of New York*, 19 N. Y. 116; *Bibb County Loan Association v. Richards*, 21 Ga. 592; *Davis v. State*, 7 Md. 151; *Commonwealth v. Drewry*, 15 Grattan; *Johnson v. Higgins*, 3 Metcalf, 567; 4 La. Ann. 297; 5 *ib.* 94, 91; 11 *ib.* 722; 15 Texas, 311. In California, and in Ohio, the constitutional provision is regarded as merely directory.—*Lehman v. McBride*, 15 Ohio St. 573; *Pim v. Nicholson*, 6 *ib.* 176; *Pierpont v. Crouch*, 10 Cal. 315. The language of the Ohio constitution is somewhat different from ours, and that probably lessens the value of the decisions in that State as an authority here. The decision in Ohio is examined in *The People v. Laurence*, (*supra*,) and we entirely concur with the opinion in that case, that it is not allowable to set aside the obligation of a constitutional provision as directory.

There are, it must be conceded, regulations in the constitution, which are mere parliamentary rules, a want of conformity to which would not make a law void.—*People v. Board of Supervisors*, 27 Barb. 575. But the clause we are considering can not be classed with them. It is a restriction upon power. It takes away the authority to amend, except in a particular mode. It does not prescribe in what form, or by what rules, the legislature must act; but it prescribes what a law of a certain character must contain. It exacts that a law, amending another, must contain the law amended. The legislature can not dispense with this requirement. The inference of the purpose to guard the legislature against imposition and misapprehension and mistake, when a bill is passing through the forms of legislation, does not oppose the conclusion, that a diminution of power was intended. A restriction upon authority to amend laws in any other than the prescribed manner is the most effective mode of compelling an avoid-

ance of the evils contemplated. But it does not seem that the only good sought to be accomplished is effected when the legislature has acted. It is also important that the governor, in deciding whether he would approve or veto an amending bill, should be informed of the law proposed to be amended; and it is at least a convenience, that all who act under a law amending another, should have both presented together. It is, therefore, a mistake to suppose, that the clause of the constitution accomplishes all its purposes, and exhausts its beneficence, while a bill is passing through the stages of legislation. It therefore cannot be a mere parliamentary rule. It was not designed, like a parliamentary rule, to operate exclusively upon the legislature, and only to govern *them* in the discharge of their duties; and our argument cannot be affected by the concession of the principle, that non-conformity to established rules of the general assembly does not make its enactments void. To have the law amended and the amending law presented in juxtaposition, facilitates the comprehension, and consults the convenience of all who examine the law after its enactment, as well as of the legislature, which examines on its passage. From the effect of the constitutional clause it may be argued, that its purpose was to assist and protect the legislature against misapprehension; but, in the same mode, the purpose to assist and protect others may be inferred. It therefore can not be, that no other operation was intended than the assistance and protection of the legislature by affording a conservative rule for its guidance.

While the question is not in words decided in *Ex parte Pollard*, (*supra*,) there underlies the argument of the opinion in that case, an admission that a law infringing the provision of the constitution would be void.

The constitution (Art. 1, § 1) expressly declares, that all laws contrary to its provisions shall be void. The amending act here is obviously contrary to a provision of the constitution. The amending act does not contain the act amended; and if it is not void, we have what the constitution says shall not be.

What we have said shows, that the complainant had no

ferry franchise, derived from the act of the legislature. The bill in chancery is, therefore, without equity, so far as any right based on the act of the legislature is concerned. The bill is equally without equity in respect to a ferry franchise granted by the commissioners' court, for the period of that grant had expired. The allegations of the bill show no right to the ferry predicated upon long possession and enjoyment. The complainant showing no right to the ferry franchise on any ground, the bill was without equity.

The decree is affirmed.

JUDGE, J.—I cannot concur in the conclusion attained by the majority of the court, on one question involved in this case, and feel it incumbent upon me to state briefly some of the reasons which induce me to dissent.

The second section of the fourth article of the State constitution prescribes certain rules for the government of the legislative department in the enactment of laws. They are as follows: "All laws shall be passed by original bill, and their style shall be, *Be it enacted by the senate and house of representatives of the State of Alabama, in general assembly convened.* Each law shall embrace but one subject, which shall be described in the title; and no law, nor any section of any law, shall be revised or amended by reference only to its title and number, but the law or section revised or amended shall itself be set forth at full length."

These fundamental rules are not *directory* merely—such as may be observed by the legislative department, or not, as may suit their convenience or pleasure. They are *mandatory*, and as binding upon the legislative department, as any constitutional injunction can be. But, being rules of *procedure* only, prescribed for, and directed to, the legislative department *exclusively*, their observance and enforcement must depend alone upon the judgment and conscience of the individual members of that co-ordinate and co-equal department of the government.

I concede the power to the judiciary to declare constitutional law, and in cases where statutes, *as rules of action*, are violative of the constitution, to override the express

will of the legislature. Life, liberty, and property, sometimes depend upon the wholesome exercise of this power, and I would not abridge it. It is a high prerogative, legitimately belonging to the judiciary; and in the United States, where legislative bodies are not, like the parliament of Great Britain, omnipotent, it rests upon sound reason and the highest authority.

But no such question is here involved; it is a question of *correct legislation* only, that is presented for our decision; it is, whether a parliamentary rule, prescribed by the constitution, and applicable only to bills in their passage through the legislature, has been observed or disregarded by the law-making power? Has the judiciary the power to determine such a question, unless it be expressly conferred by the constitution?

The powers of the State government are divided into three distinct departments, each of which is confided to a separate body of magistracy. The power of legislation being vested exclusively in the legislative department, they must, of necessity, be the sole judges of what is merely correct legislation. One, and but one, exception is made in the constitution, which I shall presently notice. If this be not a correct proposition, what becomes of the second section of the third article of the constitution, which declares that, "*No person, or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted?*" Can the judiciary step into the legislative department, on a question involving only the correct manipulation of the machinery of legislation, and supervise and control it? I have been unable to find language in the constitution, either "*expressly directing or permitting this to be done;*" and, in my opinion, the judiciary cannot do it, without erecting themselves "*into a co-ordinate political authority, and becoming practically associated with the law-making department,*" in violation of the express prohibition of the constitution.

The courts of the country have been prompt to recognize the boundaries which separate the legislative from the judicial power, when encroachments have been made by the

former upon the latter.—Sedg. on Con. Law, 167—170. They should be equally as prompt to recognize the exclusive powers of the legislative department. As has been said by a distinguished author, in treating of the enlarged and generally conceded powers of the judiciary in declaring constitutional law: “Let the magistrate be contented with his large authority, and let him not, by endeavoring to extend it, endanger the power that he now securely possesses. The judicial department should be the most vigilant by its example to resist ‘that spirit of encroachment which tends to consolidate the powers of all the departments in one, and thus create, whatever the form of government, a real despotism.’”—Sedg. on Con. Law, 219.

I have stated, that there is one case in which the judiciary would have the power, the question being properly presented, to declare an act of the legislature invalid, for non-compliance with a constitutional requisition in its passage. The constitution declares, that “no bill shall have the force of a law, until on three several days it be read in each house, and free discussion be allowed thereon, unless, in case of urgency, four-fifths of the house in which the bill shall be depending may deem it expedient to dispense with this rule.”—Art. IV, § 18. It is by force of the language employed in this section of the constitution—“*no bill shall have the force of a law*”—that the judiciary would be required, in the case stated, to declare that the act was not a law, and to deny to it all force as such; for the constitution, in denying the force of a law to a bill passed in disregard of the requisites named, makes an injunction upon the judiciary department not to enforce it as a law. No such injunction exists as to that portion of the constitution which presents the main question under discussion. And from this, an additional argument may be adduced in support of my conclusion upon the main question—viz., that if the framers of the constitution had intended that no bill should have “the force of a law,” if passed in disregard of the second section of the fourth article, they would have so declared, as they did in reference to the second section of the third article; and having declared it in the one case, and not in the other, the

inference is legitimate, that they did not intend the same result should follow, whether the non-compliance was with the one or the other.

The last clause of the last section of the bill of rights, declaring that all *laws* contrary to the provisions of the bill of rights, or the provisions following in the constitution, "shall remain void," was not intended to apply to rules of *legislative procedure*, prescribed by the constitution. Otherwise, why was it subsequently declared that "no bill should have the force of a law," unless passed as directed? This was a nugatory provision, if the last clause of the bill of rights accomplished the same purpose. The character of the "provisions" preceding this clause, to which it applies, is a clear indication of the character of the provisions following, to which it was intended it should be applied, viz., to *provisions of laws, in and of themselves, as rules of action*. Any other construction, it seems to me, is unwarranted by the phraseology itself of the clause, and unsound.

I do not feel concluded by any decision of this court, heretofore made, relating to the effect of the constitutional provisions under consideration. Neither in *Ex parte Pollard* and *Ex parte Woods*, nor in any other adjudication of this court, was the precise question here involved, considered and decided. The doctrine of *stare decisis*, therefore, does not apply.

I deem it unnecessary to say more, though the conclusion attained by myself upon the question decided by a majority of the court, might be strengthened by other arguments, especially by some of those suggested in the briefs of the able counsel for the appellants.

SATCHER *vs.* SATCHER'S ADM'R.

[APPLICATION TO SET ASIDE SALE OF DECEDENT'S LANDS.]

1. *Sale of decedent's lands for division; nature of proceeding, and jurisdiction of court.*—Repeated decisions of this court have settled the doctrine, that a proceeding before the probate court for the sale of a decedent's real estate, for equitable division among the heirs, is *in rem*; that the jurisdiction of the court attaches on the filing of a petition, stating therein a statutory ground for the order of sale; and that where the jurisdiction of the court has attached on the filing of such a petition, mere errors and irregularities in the proceedings do not render void the order of sale.
2. *Same; sufficiency of petition.*—An averment in the petition, that the lands can not be “fairly, beneficially, and equitably divided” without a sale, is a substantial compliance with the statutory requisition that they “can not be equitably divided,” (Code, § 1867,) and is sufficient to sustain the jurisdiction of the court on a motion to set aside the sale.
3. *Same, as affected by act of February 7, 1854, “to regulate the sale of real and personal property by executors and administrators.”*—The principles above stated are not in any manner changed or affected by the provisions of the act approved February 7, 1854, (Session Acts, 1853-4, p. 55,) entitled “An act to regulate the sale of real and personal property by executors and administrators.” The word *act*, as used in the fifth section of that statute, means the fifth section only, and not the whole act. (BYRD, J., *dissenting.*)

APPEAL from the Probate Court of Henry.

IN the matter of the estate of Herrin M. Satcher, deceased, on the application of Jesse Satcher and others, claiming as heirs-at-law of said decedent, to set aside a sale of his real estate, which had been previously made by his administrator, W. T. Kirkland, under an order of said probate court. The administrator's petition, on which the order of sale was founded, and which was filed on the 8th September, 1863, was under oath, and in the following words:

“To the honorable E. W. Teague, judge of the probate court in and for said county: The undersigned, administrator of the estate of Herrin M. Satcher, deceased, represents

unto your honor, that said decedent died seized and possessed of the following described lands, lying and being in said county, to-wit: the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ section 23 ; S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 22," &c.; describing all the lands by similar abbreviations, and stating the number of acres in each tract. "He further represents, that the heirs and distributees of said estate are, Herrin F. Satcher, of full age; Nancy Satcher, wife of James Satcher, and the children of James Satcher, deceased; Lucretia Grace, wife of James H. Grace, of full age, and Jesse Satcher, a minor; all of whom reside in said county, and none of whom are of unsound mind. He alleges, that a sale of said lands is necessary, upon the ground that said lands can not be fairly, beneficially, and equitably divided among the heirs and distributees of said estate, without a sale thereof. Wherefore, he prays for an order to sell said lands, according to law, and upon such terms as to your honor may seem meet and proper," &c.

On the day on which the petition was filed, the probate court made an order in the following words: "Came W. T. Kirkland, administrator of the estate of Herrin M. Satcher, and filed his application, under oath, for the sale of the lands of said deceased, which are described in said application according to law; giving the names and residences of the heirs of said deceased, and alleging that a sale of said lands is necessary, upon the ground that the same can not be fairly, equally, and equitably divided among the heirs of said deceased, without a sale thereof. And thereupon it is ordered, that the second Monday of October next be set to hear and determine said application; that J. M. B. Kelly be, and he is hereby, appointed guardian *ad litem* of Jesse Satcher, a minor heir of said deceased; and that citation be served upon him, as well as upon Nancy Satcher, for herself, and as the custodian of the minor children of James Satcher, deceased, and Lucretia Grace, heirs-at-law of said deceased, of full age; and that notice of this application, and of the day set for hearing, be given, by posting notices at the court-house and three other public places in said county, for three successive weeks before said day."

A citation was duly issued to said Kelly, as guardian *ad*

litem, service of which was accepted by him on the 10th September, 1863. On the same day on which the petition was filed, the administrator filed interrogatories to Jephtha Grace and Thomas Brown, as witnesses to prove the averments of the petition; and on the 10th September, service of these interrogatories was accepted by said Kelly, Mrs. Nancy Satcher, and one J. M. Saunders, as the administrator of James Satcher, deceased, all of whom consented that a commission might issue immediately; but a copy was not served on Mrs. Lucretia Grace until the 18th September. A commission was issued on the 30th September, under which the depositions of the witnesses were taken on the 10th October, 1863. Their answers were in these words: "To the first interrogatory they say, that they are acquainted with the lands belonging to the estate of said deceased. To the second interrogatory they say, that they are acquainted with the heirs and distributees of said estate—Nancy Satcher, wife of James Satcher, deceased; Lucretia Grace, wife of Henry Grace, and daughter of said deceased; and Jesse Satcher, minor son of said deceased. To the third interrogatory they say, that a fair, beneficial, and equitable division of said lands can not be made, without a sale of the same."

On the 12th October, 1863, the court granted the following order of sale: "Upon this day, (it being the day set to hear and determine the application of W. T. Kirkland, administrator of the estate of Herrin M. Satcher, deceased, for the sale of the lands of said deceased for division,) came the said W. T. Kirkland, and moved the court to grant his said application. And it appearing to the court that citation herein has been served upon the heirs of said deceased of full age, and upon J. M. Kelly, guardian *ad litem* for the minor heirs of said deceased, at least ten days before this day; and that notice has been given, by posting notices at the court-house and three other public places in said county, for three successive weeks before this day; and the allegations of said petition being sufficiently proved, by the testimony of two disinterested persons, taken upon interrogatories, which are of record; and no objections being made,—it is ordered, that said administrator may sell

the said lands, after giving notice of the time and place of sale, by posting notices at the court-house and three other public places in the county, for at least thirty days, at Abbeville in said county, for cash, and that he make due return thereof to this court. It is further ordered, that all papers on file, relating to this case, be recorded."

The sale was made by the administrator on the 7th December, and was reported to the court on the same day; and the court thereupon rendered the following decree: "This day came W. T. Kirkland, administrator of the estate of Herrin M. Satcher, deceased, and reported in writing, under oath, that in pursuance of an order of said court, after duly advertising, he proceeded on the 7th day of December inst., and sold at public outcry, to the highest bidder, for cash, at Abbeville, all of the lands belonging to said deceased; at which time and place, James W. Balkum became the purchaser of that portion of the lands of the deceased known as 'the mill tract,' containing about six hundred and eighty acres, more or less, lying and being in said county, at and for the sum of \$6,735, and that said purchaser has paid said amount to him; and further, that, at the same time and place, M. A. Bell and W. T. Kirkland became the purchasers of the N. E. $\frac{1}{4}$ of sec. 23, T. 1, R. 28, containing one hundred and sixty acres, more or less, at and for the sum of \$205, and has paid said amount to the administrator of said estate; and further, that, at the same time and place, Elijah W. Teague became the purchaser of that portion of the lands of said deceased known as 'the pine lands' of said deceased, containing about seven hundred and sixty acres, more or less, at and for the sum of \$3,410, and has paid said amount to the administrator of said estate; and praying for an order ratifying and confirming said sale, and for an order appointing some suitable person or persons to make titles of said lands to said purchasers. And it appearing to the satisfaction of the court that said sale was fairly and legally made, and that said lands sold for a sum not greatly disproportionate to their true value, and that the purchase-money of the same has been fully paid and discharged,—it is therefore ordered by the court, that the said report be received, and that the

said sale of said lands be ratified, and in all things fully confirmed by authority of this court. It is therefore ordered, that W. T. Kirkland, administrator of said estate, do convey by proper deeds of conveyance, to said Elijah W. Teague and James W. Balkum, all right, title and interest, which said deceased had, in and to said lands respectively purchased by them, at the time of his death. It is further ordered, that L. L. Teague be, and he is hereby, appointed commissioner to make title of said lands purchased by said M. A. Bell and W. T. Kirkland, conveying to them all right, title and interest, which said deceased had, in and to said lands, at the time of his death. It is further ordered, that all papers on file relating to this proceeding be recorded and filed."

The petition to set aside the sale was filed by Jesse Satcher and the minor heirs of James Satcher, deceased; but the record does not show at what time it was filed. It alleged, that the order of sale, and the sale, were null and void—"1st, because the administrator's application for the order of sale did not accurately describe the lands belonging to said decedent; 2d, because said petition did not give the names of the heirs and distributees, and their places of residence; 3d, because said petition did not otherwise conform to section 1868 of the Code; 4th, because forty days did not elapse *from* the filing of said petition and the granting of the order to sell said lands; 5th, because, on the hearing of said petition, no guardian *ad litem* was appointed to represent the interest of William L. Satcher, Joseph H. Satcher, and James L. Satcher, minor children of James Satcher, deceased, nor were they notified of the same; 6th, because said Jesse Satcher, being at that time over the age of fourteen years, was not notified of said application, and of the day appointed for the hearing of the same, as by law required; 7th, because said guardian *ad litem* did not deny in writing the allegations of said petition; 8th, because copies of the interrogatories were not served upon the heirs of said decedent, as by law required, nor were said interrogatories taken as in chancery cases; 9th, because citations were not served on the heirs and distributees of full age, residing in the State, notifying them of the

application, and of the day appointed for hearing the same, ten days before the day appointed for the hearing; 10th, because J. M. B. Kelley, the guardian *ad litem* for Jesse Satcher, did not consent to act as such, and did not act as such on the hearing; 11th, because the judge of probate, who confirmed the sale of said lands, was the purchaser of seven hundred and sixty acres of said lands, as appears from the report of the sale, and therefore the sale to him is void; 12th, because the interrogatories are defective, in not setting forth the lands as described in the petition, and the answers thereto are not responsive; 13th, because the depositions taken upon said interrogatories, and upon which the court ordered the sale, did not sustain and prove the allegations of the petition; 14th, because the order of sale is void on its face, as it does not show that the minor heirs were represented on the hearing by a guardian *ad litem*, and because it does not recite the facts necessary to give the court jurisdiction; 15th, because the order of sale does not set forth the lands as described in the petition, and is void for uncertainty."

On the hearing of the petition, on the 8th October, 1866, as the bill of exceptions states, "the petitioners introduced in evidence all the records of the court in reference to the cause, to prove the allegations of their petition; and it was agreed between the attorneys on both sides, and admitted as in evidence, that the minor children mentioned in the records as those of James Satcher, deceased, were the three petitioners, William L. Satcher, Joseph H. Satcher, and James L. Satcher. This being all the evidence in the cause, the court dismissed the petition;" to which the petitioners excepted, and which they now assign as error.

On the 14th August, 1866, a petition was filed in said probate court, by James H. Grace, "in right of his wife, Lucretia Grace, and as administrator of Herrin F. Satcher, deceased, (who died without wife, child, children, or their descendants,) and as the next friend of Jesse Satcher, a minor, and also of Levi, Joseph, and James Satcher, (minor children of James Satcher, deceased,)" for the purpose of setting aside the sale of the same lands. The petition

was duly sworn to by said James H. Grace, and asked that the sale might be set aside "more particularly for the following reasons: 1st, because said sale was not required by law; 2d, because the children of James Satcher, deceased, were not represented on the hearing of said application, as required by law; 3d, because James H. Grace, husband of Lucretia Grace, an heir, and Herrin F. Satcher, another heir, were not notified of said application, and no order was made for their notification; 4th, because said Lucretia Grace was not notified of said application; 5th, because all the parties in interest, or their representatives, had no notice of the interrogatories propounded to prove that said sale was necessary; 6th, because said interrogatories, and the answers thereto, do not show the necessity for said sale; 7th, because said application was filed on the 8th September, 1863, and was tried and disposed of on the 12th October following, being less than forty days after the petition was filed; 8th, because a portion of the lands was purchased by the administrator himself, who had no interest in the estate; 9th, because the judge of probate, who granted the order of sale, was the purchaser of a portion of the lands, and was legally incompetent to confirm the sale; 10th, because the report of the sale, and the order confirming it, are void for indefiniteness and uncertainty in the description of the lands; and, 11th, for such other non-compliances with the law as are apparent on the record."

The petition prayed that notice might be issued to the administrator, "and to the purchasers at said sale, if deemed necessary," to appear and contest the petition; but the record does not show that notice was issued to either of them, or that either appeared. "On the hearing," as the bill of exceptions states, "the petitioner read in evidence the proceedings and orders of the court in relation to the sale of said lands, and the report of the sale. It appeared from said records, that the application for the sale of said lands was heard, and the order granted for the sale of the same, less than forty days after the application was filed; that there was no evidence of any notice to said James H. Grace, or to his wife Lucretia, or to Herrin F. Satcher, who were heirs and distributees of said decedent's estate; that

there was no service of copies of the interrogatories to prove the necessity of the sale, either on said James H. Grace, or on said Herrin F. Satcher ; neither did it appear that any guardian *ad litem* was appointed to represent the interests of the minor children of James Satcher, deceased, or represented their interest on the hearing of the application. There was other evidence from the record, all of which appears from the transcript thereof, relative to the points by reason of which it was claimed that the order of sale and sale were void. On motion of the contestant, the court dismissed the petition, holding that the proceedings were not void on their face ; to which ruling and decision the said petitioner excepted."

From this decree an appeal was sued out by said James H. Grace, and the following errors were assigned : " 1st, the granting of the order of sale, upon the matters set out in the record and proceedings ; 2d, the granting of the order of sale, upon the facts shown by the record at the time ; 3d, the refusal to set aside the sale, upon the petition for that purpose and the evidence to sustain it ; 4th, the confirming of the order of sale, as shown by the record at the time ; and, 5th, the ruling upon the matters set out in the bill of exceptions."

The two cases were argued and submitted separately, but were considered and decided together.

W. C. OATES, RICE, SEMPLE & GOLDTHWAITE, and MARTIN & SAYRE, for the appellants.—The petition to set aside the sale specifies the numerous errors and irregularities in the proceedings, for which the validity of the sale is impeached ; and the record of the proceedings affirmatively sustains all the allegations of the petition. It is shown that the appellants' lands were sold, by virtue of proceedings to which they were not parties, and of which they were not notified, without pleadings or proof of the facts necessary to authorize the sale, and in utter disregard of all the statutory requisitions which were designed to protect the interests of infants and married women ; and that the administrator who procured and made the sale, and who had no such interest in the estate as authorized him to become

the purchaser at his own sale, and the probate judge by whom it was confirmed, were the principal purchasers. Does the law sanction such proceedings?

1. Tested by the former decisions of this court, construing the acts of 1818, 1820, and 1822, in relation to the sale of a decedent's real estate by order of the probate court, the sale in this case can not be sustained. Those decisions hold—1st, that the proceedings are *in rem*; 2d, that the jurisdiction of the court attaches on the filing of a petition, in which is set forth a statutory ground for the sale; and, 3d, that when the jurisdiction of the court has once attached, by the filing of a sufficient petition, no subsequent irregularities can invalidate the proceedings, when collaterally attacked. But, in this case, the jurisdiction of the court never attached; the petition was not sufficient. The averment of the petition was, that the lands could not be “fairly, beneficially, and equitably divided,” without a sale; while the statute requires an averment that they “can not be equitably divided.” The petition seems to have been framed with reference to the act of 1822, (Clay's Digest, 224, § 16,) which authorized a sale when the lands could not be “equally, fairly, and beneficially divided”; and it would be sufficient under that statute. But the change in the language of the statute implies a corresponding change in the intention of the legislature; and while the word *equitably*, in the new statute, may be held synonymous with *equally* in the old, or with *equally and fairly*, it can not be construed as the synonym of the three adverbs conjointly used in this petition. To hold the petition sufficient, the word *and* must be construed to mean *or*, or no effect whatever must be attributed to the words *fairly and beneficially*.

But, even if the petition was sufficient to give the court jurisdiction, the former decisions of this court hold, that subsequent errors and irregularities, although they do not affect the proceedings when collaterally assailed, may be examined and corrected “by writ of error, or appeal, or by some other mode of proceeding acting directly and immediately” on the decree.—*Lightfoot v. Lewis*, 1 Ala. 175; *Matheson's Heirs v. Hearin*, 29 Ala. 210. In the recent case of *Doe d. Saltonstall v. Riley*, (28 Ala. 182,) it is dis-

tinently said, that such irregularities and errors "may furnish good grounds for setting aside the sale." A motion to set aside the sale is a direct proceeding, and is, in some cases, the most appropriate remedy. Indeed, in some cases, as in this, it is the only remedy; for only a party to the proceedings can appeal from the decree, and an appeal must be sued out within two years, at most, from the date of the decree; and if a person who ought to have been notified, but was not, is afterwards made a party to the proceedings, in order that he may sue out an appeal, the order making him a party relates back to the date of the original decree, and his appeal is thus barred before he can sue it out.—*Binford v. Binford*, 22 Ala. 682. In this case, the appellants were not made parties, and were never before the court; and some of them had no notice of the proceedings, until after the expiration of the time limited for an appeal from the decree. One chief cause of complaint by them is, that they had no notice of the proceedings, and no opportunity to oppose the sale; and a motion to set aside the sale is the only remedy left to them.

Again; although the court may have had jurisdiction to grant the order of sale, yet the probate judge, having become one of the purchasers at the sale, as is shown by the decree confirming the sale, was incompetent from interest to confirm the sale; and for this reason, the sale, and the order confirming it, ought to be set aside.—*Wilson v. Wilson*, 36 Ala. 655; *Heydenfeldt v. Towns*, 27 Ala. 423, 439.

2. But it is strenuously insisted, on the part of the appellants, that the former decisions of this court, construing the acts of 1818, 1820, and 1822, do not furnish the rule by which this case is to be decided. Those decisions, commencing with the case of *Wyman v. Campbell*, (6 Porter, 219,) never commanded the assent of the bench or bar of the State; and in later years, each successive case has been placed on the doctrine of *stare decisis*. The grave objections to which those decisions are obnoxious, and the increasing dissatisfaction with which they were regarded, at length induced legislative interposition; and the act of February 7, 1854, entitled "An act to regulate the sale of real and personal property by executors and administra-

tors," was passed to remedy the evil, and to change the law which the courts had established as a rule of property. It was certainly competent for the legislature to change a rule of property which had thus been settled; to declare in what cases the probate court should have the power to order the sale of a decedent's real estate, and in what cases it should not; to alter the nature of the proceeding by which a sale was to be accomplished, or, without changing the nature of the proceeding, to declare the effect of errors and irregularities intervening after the jurisdiction of the court had attached, and to make a non-compliance with statutory requisitions, which were formerly non-essential, fatal to the validity of the sale and order of sale. The act of 1854 was intended to effect these changes; and its provisions are well adapted, as its language is appropriate, to accomplish the purposes for which it was designed; indeed, more appropriate language, or plainer and more positive provisions, could not well be devised.

The act of 1854 abolishes all distinctions, formerly existing, between a sale of land for division, and a sale for the payment of debts, and places all sales, for whatever purpose, on the same footing; making a compliance with "the requisitions of this act" essential to the validity of each. This change is significant, for it annihilates all ground for the assumption, which underlies the leading case of *Wyman v. Campbell*, that the personal representative, who applies for the order of sale, is "the sole party representing the estate"; and this very assumption is also the foundation of the case of *McPherson v. Cundiff*, (11 Serg. & Rawle, 430,) which is the controlling authority in the case of *Wyman v. Campbell*. It is impossible to hold that, under the act of 1854, the proceeding is *in rem* merely, or that jurisdiction of the subject-matter only is essential to the validity of the sale. Jurisdiction of the persons adversely interested, as well as of the subject-matter, is imperatively required by that act. The act shows, on its face, that it was framed and adopted under a deliberate conviction, that the safeguards provided by the old law, as settled by judicial construction, to protect the helpless against negligence, oppression, and fraud, were wholly insufficient;

and that the interests of helpless infants and women required a recurrence to the fundamental principle of justice, that every man shall have notice of any judicial proceeding which seeks to divest him of his rights.

To effectuate the purposes designed by the act of 1854, the law-makers employed, *ex industria*, two of the best settled modes of avoiding ambiguity in statutory provisions: that is, 1st, words of exclusion; and, 2d, words of enumeration, or specification. They first use words which, standing alone and unqualified, would deprive the probate judge of all jurisdiction or power to order a sale, and then they specify the particular cases in which he may exercise that power. "No application for the sale," is the language of the first section, "of the lands of deceased persons, shall be acted upon by any judge of probate, unless such application shall conform to the requirements of section 1868 of the Code"; while the fifth section declares, "that any order of sale, and sale, made without a compliance with the requisitions of this act, shall be wholly void". Construed in connection with the known evil to be remedied, this language is plain and unambiguous. The presumption is, that the law-makers knew the meaning of the language which they used, and meant what they said; that when they said "shall be wholly void," they did not mean "may be avoided on error or appeal"; that when they said "this act," they did not mean "the fifth section of this act." What are "the requisitions of this act," a non-compliance with which renders "wholly void" every sale and order of sale? Two requisitions, and but two, are found in the whole act; one being in the second section, and the other in the fifth. No ingenuity can make more than one requisition out of the fifth section—the requisition, namely, that proof shall be taken as in chancery cases, where minors or persons of unsound mind are interested, whether the allegations of the petition are denied or not. It requires a very strong case to authorize the courts to impute a mistake to the legislature, and, on the assumption of such mistake, to substitute new and different words for the words actually used in a statute; yet, here, the court must suppose two mistakes, and substitute two new words—must hold that "this act"

means "this section," and that "the requisitions" of the act mean the single requisition of that section.

In support of the rules of construction above contended for, and the propositions above stated, the following authorities are cited: Smith on Statutes, §§ 478, 482, 488, 491; Sedgwick on Const. & Stat. Law, 319, 322, 350, 369, 372, 378; *Regina v. Inhabitants of Fordham*, 11 Ad. & El. 88; *Davison v. Gill*, 1 East, 64; *Bloom v. Burdick*, 1 Hill, N. Y. 130; *Schneider v. McFarland*, 2 Comstock, 459; *Havens v. Sherman*, 42 Barbour, 636; *Sears v. Terry*, 26 Conn. 273; 7 Barn. & Cr. 6; 1 Mann. & Gr. 448; 1 Burr. 445; 2 Stra. 1123; 7 Mass. 524; *Macy v. Raymond*, 9 Pick. 286.

PUGH & BAKER, *contra*.—Under the former decisions of this court, the jurisdiction of the probate court to order the sale attached on the filing of the petition, in which was alleged the existence of one of the statutory grounds for the sale; and all the subsequent errors and irregularities avail nothing in this proceeding.—*Wyman v. Campbell*, 6 Porter, 219; *Cox v. Davis*, 17 Ala. 714; *Field's Heirs v. Goldsby*, 28 Ala. 218; *Matheson's Heirs v. Hearin*, 29 Ala. 210; *King v. Kent's Heirs*, 29 Ala. 542. These decisions have become a settled rule of property, and public policy requires that they should be sustained. To overrule them, would work manifest injury to the interests of decedents' estates, by creating among purchasers a distrust in the validity of sales by the probate court, and thus causing sales, when necessary, to be made at great sacrifices. The act of 1854, while endeavoring to regulate these sales, does not show a manifest intention to change this settled rule of property. Its provisions are various, and somewhat conflicting; and such a construction must be placed on the entire act as will make all its parts harmonize, if possible. Some of its provisions are clearly directory only, though imperative words are used. The important change intended to be effected by that act was, to require proof of the jurisdictional fact of the necessity for the sale, where minors and persons of unsound mind were interested in the estate; and it can be allowed full effect to that extent, without unsettling the former decisions.

A. J. WALKER, C. J.—A motion was made in the probate court, by the appellants, to set aside the sale by the appellee, of the lands of their deceased ancestor, under an order of such court, granted on application of appellee as administrator. The motion was preceded by a petition, which was treated as an exhibition of the grounds of the motion; and after a trial, in which evidence was introduced, the court overruled the motion, and refused to grant the petition. The case presents the question, whether the order of the probate court for the sale of the land was void.

[1.] It is the settled doctrine in the decisions of this court, that the proceeding before the probate court, for the sale of the lands of a decedent, is *in rem*; that the jurisdiction of the court attaches, upon a petition setting forth a statutory ground of sale; and that the order of sale is not void, although the proceedings may abound in errors, if the petition contain the above-stated jurisdictional allegation.—*King v. Kent*, 29 Ala. 542; *Matheson v. Hearin*, 29 Ala. 210; *Field v. Goldsby*, 28 Ala. 218. This doctrine is beyond the pale of controversy in this court. The order of sale was, therefore, not void, unless the jurisdictional allegation was wanting; or unless the principle established by this court has been changed by statute, and the invalidity of the decree results from an application of the law as it is made by such change. We must, then, test the validity of the decree of sale, by making two inquiries, to-wit: 1st, whether a ground of jurisdiction is alleged in the petition; and, 2d, whether there is a statute, which so changes the law, that from its application the invalidity of the order upon some other ground results. These two inquiries we make in the order of their statement.

[2.] The jurisdictional allegation is, that the land could not "be fairly, beneficially, and equitably divided." This allegation seems to have been designed to be conformable to the act of 1822, which requires an allegation that the land "can not be equally, fairly, and beneficially divided." Clay's Digest, 224, § 16. The ground of jurisdiction under section 1867 of the Code, which was the law in force when the application was made in this case, is, that the land "can

not be equitably divided." It is obvious that there is not a *verbal* conformity of the allegation of the administrator's petition to the section of the Code, under which it was filed. But in *King v. Kent*, (*supra*,) it was held that an allegation, of import equivalent to that required by the statute, will sustain the jurisdiction, and that in determining whether the allegation is of equivalent import, the court should select the signification of words favoring the validity of the order. In that case, we remarked, after a most careful consideration of the point, "that in determining whether the record does disclose the jurisdictional facts, we should construe the language of the record most favorably for the maintenance of the decree, and, where words are susceptible of two or more constructions, adopt that which will sustain the decree." Whether the same rule of construction would prevail on appeal from an order of sale, we do not now decide; but we have no doubt of the propriety of its adoption in this case, where a motion is made to set aside an order of sale, in the court which rendered it.

It is conceivable, that a construction might be placed upon the words, "fairly, beneficially, and equitably divided," which would render them diverse in effect from the words "equitably divided." They are, however, susceptible of a construction, which would make each of the three adverbs so nearly the synonym of the others, that, if there be a distinction at all, it is too nice for practical application, and not likely to be observed by those unaccustomed to refinements in defining words. One of the definitions of "*fairly*" is "*equitably*," (Worcester's Dictionary,) and if we understand "*beneficially*" to refer to and qualify the division, as affecting the interest of the respective owners in the land itself, we can not perceive how a division, which would not *in itself* be beneficial, or (adopting an equivalent positive form of expression) which, tested by its own intrinsic qualities, would be injurious, could be equitable. Upon this reasoning, we decide, that the jurisdictional allegation is, for the purposes of this case, sufficient.

[3.] Has any act of the legislature so changed the law, that the order of sale is void for any reason disclosed by

the record, notwithstanding the jurisdiction of the court to make the order attached? The only statute supposed to have such an effect is the act of 7th February, 1854, pp. 55, 56. That act consists of five sections, an analysis of which becomes necessary to a comprehension of the question we are to decide, and of the argument in support of our decision.

The first section amends various sections of the Code, so as to leave it in the discretion of the court to require notice of applications for orders of sale, and of sales, to be given by publishing advertisements in a newspaper, or by posting them up.

The second section declares, that all applications must conform to the requirements of section 1868 of the Code. The requirements of that section are, that the application should accurately describe the land, give the names of the heirs or devisees, and their places of residence, and state which of the heirs are infants, married women, or of unsound mind.

The third section extends the duties imposed upon the judge of probate by sections 1869, 1870, 1871, and 1872 of the Code, to all applications for sale of land. The duties imposed by those four sections upon the probate judge are, to appoint a time, not less than forty days from the application, for hearing it; to appoint a guardian *ad litem* for infants and persons of unsound mind; to issue a citation to the adult heirs or devisees residing in the State, notifying them of the application, and of the day of hearing, which citation is required to be served ten days before the hearing, and upon husband and wife, where there are married women; to make publication in a newspaper as to non-residents; to require proof by depositions, and to file the depositions "*of record*," and to confirm the sale when made.

The fourth section requires, that the guardian *ad litem* should deny in writing the allegations of the petition, "and, if necessary, employ counsel to defend the interest of those he represents," and that the guardian *ad litem* should not be the petitioner, or of kin to the petitioner.

The fifth section of the act is in the following words :

"No order for the sale of land belonging to any estate shall be made, when there are minors, or persons of unsound mind, interested in such estate, unless the probate court shall have taken proof by deposition, as in chancery cases, showing the necessity of such sale; and this proof shall be taken, whether the allegations in the petition are denied or not by the guardian, or other person appointed by the court to represent the minors or persons of unsound mind; and any order of sale, and sale, made without a compliance with the requisitions OF THIS ACT, shall be wholly void."

It is argued for the appellants, that under the last clause of the fifth section of the statute, every order of sale, and sale, made without a compliance with each of the several requisitions of the five sections above noticed, is wholly void. We can not assent to such a proposition. The maintenance of it would lead to consequences alike absurd and injurious. It would make a strict compliance with a large number of statutory requisitions the unyielding standard of the validity of all orders of sale. Some of those requisitions pertain to matters not evidenced by the record. For example, a decree of sale would be void, if the guardian *ad litem* was of kin to the administrator, or if there was an inaccuracy in the list or description of the heirs, or their residences, or if the directions as to the mode and time of giving notices were not strictly observed. One desiring to purchase at the sale would be unable to ascertain, by an examination of the record and papers, whether the title would be valid. After making the most careful inquiry, and finding no defect in the proceedings, and therefore venturing on a purchase, his title might be defeated by evidence that there was some heir whose name was overlooked or forgotten by the administrator, or not known by him, and therefore not inserted in his petition. In like manner, his title might be defeated by a mistake as to the residence of any one or more of the heirs. Many other equally forcible illustrations of the unavoidable and irremediable uncertainty of such sales might be given. When it is considered that the probate judges do not generally belong to the profession of the law, and are not chosen generally for their legal attainments, it is not difficult to perceive that, if the

proposition asserted by the counsel should be maintained, a valid sale of land under the order of the probate court, since the date of the act of 1854, would be an exception to a general rule. Not merely the tendency, but the inevitable effect of such a decision, would be to destroy confidence in such sales, and cause great injury to heirs by sales at greatly depreciated prices, when an exceptional case of a compliance with the numerous requisitions of the statute occurs. The legislature will be held to have absurdly subverted its own purpose of benefiting estates, by affording a safe, cheap, and expeditious mode of accomplishing the sales required in the process of administration, with the strictest care for the interest of the persons interested, and to have adopted a plan which would lead to the sacrifice of estates. The courts of the country would be filled with suits, in which the validity of sales will be contested upon the question of a compliance with all the minute details of the machinery by which the sale was reached.

The absurd and ruinous consequences of a statute which is plain, afford no justification for setting it aside by the courts.—Smith on Statutory and Constitutional Construction, 627, § 478; Sedgwick on S. & C. Law, 211–213. But, if there is uncertainty and obscurity in the law, such consideration may be taken into view, as a help to the ascertainment of the legislative intention, and one clause may be compared with another.—Smith on S. & C. Construction, 631, §§ 484–489, 648, § 503; Sedgwick on S. & C. Law, pp. 296–305, 311. If it were clear that the legislature had prescribed that the validity of the order of sale should depend upon a strict compliance with all the requirements of the five sections of the statute, we certainly should have no election, and, however injurious we might deem the law, it would be our duty to execute it. The legislature has not clearly so prescribed.

The declaration in the last clause of the fifth section, that all orders of sale, and sales, made without a compliance with the requisitions "*of this act*," shall be wholly void, is a part of the same sentence with the direction as to the mode of taking proof when minors or persons of unsound mind are parties, and is separable from it only by a comma or

semi-colon, and connected with it by the copulative conjunction "and." The collocation of the two members of the sentence, and their grammatical connection, strongly tend to show, as will be suggested to any person reading the sentence through, that by "the requisitions of this act" is meant the requisitions of this section. The fifth section of the statute is in itself a complete announcement of the legislative will, having no connection with, or dependence upon the four preceding sections. It is of itself within the definition of an act, and may be correctly denominated an act; and if the fifth section should be called an act, the word would be correctly used. It is true that the word *act* is generally used to designate the entire bill with all the parts, adopted by a single effort of the legislative will. Nevertheless, in another, and perhaps more correct sense of the word, the distinct and complete and independent legislative command contained in the fifth section may be denominated an act. There is, therefore, no violence to the meaning of the word by referring it to the section, as the context indicates was intended by the legislature. We should, however, perhaps still feel bound to refer the word act to all the sections, if the intention to restrict its application was not otherwise and for additional reasons apparent.

The fifth section is limited to cases in which infants and persons of unsound mind are interested. Those parties are incapable of protecting themselves, and therefore the legislature seems, *ex industria*, to have guarded their rights. For this purpose purely the fifth section seems to have been framed. It provides, that when such persons are interested, the proof must be taken as in chancery cases, showing the necessity of the sale, whether the allegations are denied or not. We think that the latter clause of the section sprung from the same strong desire of the legislature to protect those persons incapable of protecting themselves, by making the omission of the cautionary step in their favor a reason for the unqualified invalidity of the decree, and of the sale made in pursuance of it.

The third section of the act, by incorporating section 1872 of the Code, requires that the facts stated in the ap-

plications should be proved by the depositions of disinterested witnesses. The fifth section requires proof in the same mode of the allegation of the necessity of the sale, in cases where infants and persons of unsound mind are parties. After making the requisition of proof by depositions of all the allegations in all cases, the statute repeats it as to a particular allegation in reference to a particular class of cases. Why was this done? Is it simply a vain repetition? Has the direction as to taking proof in the fifth section no effect? If a non-compliance with the requirement of the third section renders the order of sale wholly void, then the repetition of the requirement as to a particular allegation in a particular class of cases is altogether supererogatory and useless. But if, on the other hand, the word *act* in the fifth section refers only to the enactment contained in that section, we have an operation for the mandate of the fifth section as to the mode of taking proof of the necessity of sale in a particular class of cases. Parties incapable of protecting themselves are selected as the special subjects of legislative protection, and, as to the jurisdictional allegation, a mode of proof calculated to shield them from imposition, common to all other cases, is enforced by an unbending rule, that its neglect shall utterly vitiate the order, and the sale made in pursuance of it. Upon no other theory has the first clause of the fifth section any office to perform.

The fourth section of the statute requires, that the guardian *ad litem* should deny in writing the allegations of the petition. The fifth section requires, that proof of the necessity of the sale should be taken by deposition, whether the denial by the guardian *ad litem* is made or not. Now, if the word *act* in the fifth section embraces all the antecedent sections, and if, therefore, a non-compliance with any one of the requisitions of the antecedent sections renders the order of sale absolutely void, it would be void on account of the failure of the guardian *ad litem* to deny all the allegations of the petition. The order being void in the absence of the denial, what reason could there be in requiring in the fifth section that proof should be taken of a particular allegation, notwithstanding there was no denial? If

the order was void in the absence of the denial, what office is performed by the statutory mandate in the fifth section, that the proof should be taken in the prescribed manner, whether there was a denial or not, and in default thereof, that the order should be void? According to the argument which we combat, the legislature says, if there is no denial the order is void in all cases; and it immediately proceeds to say, if there is no denial, and if in addition thereto the proof of a particular allegation is not taken in the prescribed mode, the order in a particular class of cases is void. It is thus obvious that, upon the construction we are contesting, the direction of the fifth section, that the proof should be taken of a particular allegation in a specified class of cases, whether the prescribed answer was filed or not, under penalty of absolute invalidity, is supererogatory and useless. Upon the supposition that only a non-compliance with the fifth section renders the order void, an office for the direction is found. The legislature must be supposed to have known, that under the decisions of this court the mere omission of the guardian *ad litem* to answer would only render the order voidable; and it therefore separates the cases of infants and persons of unsound mind, and as to them makes a special provision, that although the guardian *ad litem* may neglect his duty, and fail to controvert the allegations by a written denial, the proof of the material allegation of the important fact of the necessity of the sale must be made by depositions. To this protection for persons not *sui juris* it was deemed necessary to give the guaranty, that the order should in its absence be wholly void.

It is the duty of courts to strive to give a reasonable operation to every part of the law, and never to attribute, if possible, to the legislature the doing of a vain and useless thing.—Smith on S. & C. Construction, 671, § 627. We consult this cardinal and wise rule of interpretation by holding, that “the requisitions of this act,” a non-compliance with which makes void the order of sale, mean the requisitions of the fifth section.

In this case, the requisite jurisdictional fact was alleged, and it was proved by depositions taken as in chancery cases;

and although there are defects in the proceeding, including a failure to correctly state the names of the heirs, the order of sale is not void.

An argument against the conclusion attained by us, and above expressed, has been drawn from the peculiar phraseology of the second section of the act of 7th February, 1854. That section declares, "that no application for the sale, for any purpose, of the lands of deceased persons, *shall be acted upon* by any judge of probate, unless such application shall conform to the requirements of section 1868 of the Code." We attach no importance to the prohibitory character of phraseology which is adopted. Unquestionably, in every statute prescribing the duties of the probate judge, a prohibition of inconsistent action by him is implied. The prohibition is quite as clear, though perhaps less emphatic, in a statute which positively prescribes that the court shall act upon an application of specified character, as in a statute which prohibits action without such application. The peculiar phraseology of the second section above noticed, therefore, makes no change in the question of what gives the court jurisdiction. There is no change in the statute which affects the decisions of this court as to what is requisite to sustain the jurisdiction of the probate court to order the sale of lands of decedents. Those decisions are eminently rules of property, and ought not now to be disturbed. The purpose of the adoption of the second section above copied was not to change the law on the subject of jurisdiction. There was, before the adoption of that section, a difference in the prescribed allegations of a petition for the sale of land under sections 1754, 1755 and 1756, from those of a petition under section 1868. The latter required statements of an important character which the former did not. The object of the second section was to make the requirement of those statements applicable to proceedings for the sale of land under the other sections.

The peculiar phraseology of section two of the act of 7th February, 1854, is pressed with so much persistency upon us, as showing that the legislature intended to make the pursuit of its command essential to its jurisdiction, that we

are induced to present in parallel column with it a provision of the act of 1822.

Second section of act of 1854:
 "No application for the sale for any purpose, of the lands of deceased persons, shall be acted upon by any judge of probate, unless such application shall conform to the requirements of section 1868 of the Code."

Fourth section of the act of 1822: "Said court shall not decree or order sale of the real estate described in such petition, unless satisfied by proof, to be taken by deposition as in chancery cases, and filed in the cause."—*Clay's Digest*, 225.

It is impossible to find anything in the left-hand column, tending more clearly to prescribe a condition precedent to the exercise of jurisdiction, than is found in the right-hand column. Yet it is well settled, that jurisdiction did not depend upon a compliance with the extract from the act of 1822, and has been so settled since the decision in *Wyman v. Campbell*, (6 Porter,) made nearly thirty years ago. It is, therefore, utterly impossible for us to hold that the language used in the second section of the act of 1854 varies the question of jurisdiction.

The proceeding in the probate court for the sale of decedents' lands is held, by a long chain of decisions not now to be questioned, to be *in rem*; and therefore the validity of the orders can never depend upon the fact that the court has acquired jurisdiction of the persons of the parties. The requisition of notice is just as plainly and as positively made in the act of 1822 as under any subsequent law. *Clay's Digest*, 224, § 17. Under the act of 1822, the order of sale was not void on account of the want of notice. It was so settled by the decisions of this court. We can not decide to the contrary, unless we disregard the doctrine of *stare decisis*, and overturn decisions which constitute a rule of property, under which millions of dollars worth of land are probably held. No person who will examine the act of 1822 can say that there is a reason for regarding the proceeding to sell land under the present law as *in personam*, which did not apply to the old law, under which, as every intelligent lawyer knows, the proceeding was regarded as *in rem*.

We have examined the opinion and record in *Johnson v. Pynes*, decided at the June term, 1866, and we think the decision in that case can be sustained without disturbing any principle settled in this opinion.

In this case we have waived a critical examination of the bill of exceptions, but we do not decide that it is so framed as to present for revision the questions adjudged.

Affirmed.

In the case of *Grace v. Kirkland*, the decree of the probate court is affirmed, on the authority of this case.

NOTE BY THE REPORTER.—After the delivery of the original opinion in this case, the appellants' counsel made an application for a re-hearing. The application was overruled, but the opinion of the court was modified in some particulars, though the opinion now on file does not show what changes were made. On the application for a re-hearing, the following dissenting opinion was filed by BYRD, J.

BYRD, J.—I yielded my assent to the original opinion of the court with reluctance; and now, on the application for a re-hearing, I desire to say, that my difficulty consists in restricting the clause of the fifth section of the act approved February 7, 1854, (Pamph. Acts, p. 55,) which reads as follows—"and any order of sale, and sale, made without a compliance with the requisitions of this *act*, shall be wholly void,"—to that section. The title of the act is, "An act to regulate the sale of real and personal property by executors and administrators," and it seems to me that the sensible and legitimate interpretation of the words "this act," used in the clause recited, is to refer them to the word "act" in the title, and not to the fifth section of "this act." Again, if they only refer to that section, then the words, in the clause recited, "and sale made," would be unmeaning; for if, under that section, the "order of sale" was "wholly void," then no sale under it would be valid, nor would it confer any title on the purchaser. But I find an office for the words "and sale made," by looking back to the first section of the act; for, although the "order of sale" might

be valid, and free from all objection, yet the legislature intended to declare the sale should be "wholly void," unless the executor or administrator gave the notice for the time and as required by the provisions of the first section of the act.

It is admitted that, to give the clause recited a literal construction, would present some apparent absurdities and hardships. But for these, the legislative, and not the judicial department, would be responsible: *ita lex scripta est*. Besides, as to any real absurdities arising from such a construction, there are well-recognized principles of construction, which would dispose of them, but which I shall not attempt to solve in this case, as my brethren are confident of the correctness of their opinion, and I see no good to arise from a further consideration of the subject on my part. The decisions of the court before the passage of the law, was, no doubt, the cause of its enactment.

I content myself with the expression of the foregoing views, and with the further remark that, although I am in favor of a rehearing of the cause, yet, deferring to the opinion of my brethren, I yield to their opinion my judicial acquiescence.

STEAMBOAT BELFAST vs. BOON & CO.

[LIBEL IN ADMIRALTY AGAINST STEAMBOAT.]

1. *Constitutionality of State law, authorizing proceeding in admiralty against steamboat.*—Neither the constitutional grant to the United States of judicial power in "all cases of admiralty and maritime jurisdiction," (art. III, § 2,) nor any of the acts of congress which have been passed to carry that grant into effect, takes away from the several States the right to create or declare a statutory lien in favor of a shipper, for the loss of his goods, on a vessel navigating an interior river above tide-water, and to authorize the enforcement of that lien in a State court, by a proceeding in the nature of a libel in admiralty; the suit being brought in the State in which the contract of affreight

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ment was made, and in which are situated both the place at which the goods were shipped, and the place at which they were to be delivered. (A. J. WALKER, C. J., *dissenting*.)

2. *Liability of common carrier, for loss of goods by piracy or robbery.*—At common law, piracy was a defense to a common carrier, for the loss of goods, but robbery was not; and this principle of the common law is not in any manner changed or affected by the act of congress of 1820, (1 Brightly's Digest, 20th, § 35,) which declares robbery on any river where the tide ebbs and flows to be piracy.
3. *Amended answer to libel.*—When an amended answer to a libel in admiralty is repugnant to the original answer, the court may properly refuse to allow it to be filed; but, after it has been filed by permission of the court, an exception to it on account of such repugnancy comes too late.
4. *Mistake in written contract not available as defense.*—In an action on a written contract, an alleged mistake is not available as a defense—the mistake must be first corrected, by an appropriate proceeding, in equity.
5. *Fraud; what constitutes.*—A misrepresentation as to a matter of law does not, ordinarily, constitute a fraud; nor does a misrepresentation as to a matter of fact, concerning which the party complaining ought to have been informed at least as well as the opposite party, and where no relation existed between them which justified him in relying on the representations of the other party without inquiry.

APPEAL from the City Court of Mobile.

Tried before the Hon. H. CHAMBERLAIN.

THE appellees in this case filed a libel, on the 30th March, 1866, against the steamboat *Belfast*, to recover damages for the loss of twenty-nine bales of cotton, part of a lot of one hundred bales, which were shipped by them on said steamboat, on the 23d January, 1866, at Vienna, in Pickens county, Alabama, consigned to J. E. Curran & Co. at Mobile. Libels were also filed against said steamboat by J. H. & S. B. Steers and John Watson & Co., (the libel of the former being filed on the 29th, and that of the latter on the 30th March, 1866,) to recover damages for the loss of cotton shipped by them, on the same trip, at Columbus, Mississippi, and consigned to persons in Mobile. The sheriff having taken possession of the boat under these libels, B. C. Nelson and A. F. Hurtel intervened as owners, and filed an answer to the libel in each case; and, in the two cases of Steers and Watson, they filed a protest to the jurisdiction of the court, "because the contracts of affreight-

ment, upon which said libels are founded, were entered into in the State of Mississippi, and beyond the jurisdiction of this court." The court overruled the protest to the jurisdiction; to which ruling and decision exceptions were reserved by the libellants, Steers and Watson. The following are the material allegations of the answer to the libel of Boon & Co., the answers in the other cases being substantially the same:

"3. Respondents are informed, that said boat left Columbus, for Mobile, on the morning of the 22d of January, 1866; that said boat descended said river, until she reached a point about five miles below Coffeetown, at 'Malone's Gin,' at which time she had on board a number of passengers, and five hundred and ninety-five bales of cotton, consigned to different firms in Mobile; that near said gin-house, between nine and ten o'clock P. M., on the 25th day of January, 1866, a party of men, on the east bank of the river, hailed said boat with a light, as is usual on said river. The captain, who was at the wheel at the time, had the engine stopped, and asked what was wanted. They replied, they had freight to go on board. The captain informed them he could not take any more freight. They then informed the captain that there were passengers to go aboard. The captain informed them that he could not accommodate any more passengers. By this time, said boat was within twenty or thirty yards of the bank, when about twenty armed men cocked their guns, and levelled them at the boat, and told the captain that, if he did not land the boat, they would fire into her. Being satisfied that the threat would be carried into execution, and fearing a destruction of life and property, and hoping to save said boat and cargo, the captain landed said boat, as ordered; when a man by the name of Britton came aboard, and asked the captain if there were any Yankees aboard. The captain said that there were no Yankees aboard, that he knew of. Britton then demanded the surrender of the boat. The captain replied, that she would not be surrendered; when Britton cried out, "Boys, come aboard;" when about twenty armed men came aboard, all disguised by having their faces blacked. Britton again demanded the surrender of the

boat ; the captain refused to surrender, and was then surrounded by said armed men, and arrested by them. The captain was then ordered by Britton to go to the wheel, but replied that he would die first. They then marched the captain to his office, made him go into the office, and locked the door, and put an armed-guard over him, and took forcible possession of said cotton, boat, &c.

"4. Respondents are informed, that an armed body of men went to E. H. Gordy, the pilot, and compelled him by force to go to the wheel, and the engineers were likewise compelled to get up steam on said boat by said armed men, and said boat was started down the river ; that said armed men put off cotton at different places on the river, as the boat went down ; that said boat was taken into 'the cut-off' by said armed men as aforesaid, on Sunday morning, the 28th day of January, 1866 ; that she was there tied up until near night, and then started up the river, and about 8 o'clock P. M., at the lower end of 'McIntosh's Bluff,' the boat was landed, and the captain driven ashore by said armed men ; that said boat was then moved up the river a distance of about eight miles, where both the clerks were driven ashore ; that said boat was then moved up the river, to a place called 'Beckham's Landing,' where another lot of cotton was put off ; that said boat was then turned over and delivered to the mate and pilot, and was then rounded to, to go down the river ; but, as she rounded to, she was fired into by a party on shore, several of the shot or balls passing through the pilot-house ; that said boat was landed, and inquiry made as to why she was fired into ; to which the parties on shore replied, that they thought the persons on said boat wanted to steal the cotton on the bank ; said boat was then started down the river, took on the clerks, and then the captain, when she was put under charge of the captain, who moved the boat a short distance below to the mouth of the bayou just above the junction of the rivers, where he found the steamboat *Marengo* taking a portion of the cotton that had been put off the *Belfast* ; that in a short time a gunboat of the United States came up, under charge of an officer of the United States ; that said officer took charge of said steamer *Belfast*, and

ordered the captain to go up the river to 'Paine's Landing,' and to take on board all the cotton that could be found that had been taken from the *Belfast*; that this was done, and the said boat then proceeded to Mobile, under charge of said United States officer; that said boat reached Mobile on the morning of the 31st of January, 1866; that Captain Taylor and the officers of said boat afterwards entered a protest, in due form, a copy of which is hereto attached, marked 'exhibit (A),' and made a part of this answer,—the original will be produced on the trial, if required; that the whole matter was investigated by the military authorities, in pursuance of an order of Major-General C. R. Wood, commanding the district of Alabama; that the officers of said boat were discharged, and those who committed the robbery kept or held for trial; that some of them have been convicted for robbing said boat, and sentenced, and others held under bond for trial. All the evidence, proceedings, &c., will be exhibited to this honorable court, if required.

"5. Respondents are informed, that said steamboat was delivered by the military authorities to Charles Briggs & Co., as the agents of the owners, on the evening of the 31st of January, 1866; that all the cotton shipped on said boat, at Columbus and intermediate landings, as aforesaid, was then, and at different times since, delivered to the different consignees thereof, except from thirty-eight to forty-three bales; that there are two other cases pending in this honorable court, against said boat, for cotton said to have been lost on said downward trip as aforesaid, one for the value of thirty bales, and one for the value of thirty-four bales.

"6. Respondents are informed that, on the 9th day of February, fifty-nine bales of said cotton, which had been recaptured after it had been taken from said steamer *Belfast*, was turned over and delivered by Charles Briggs & Co., as agents of said boat; that, owing to the fact that the marks on the cotton had been defaced, and, in some instances, the bagging partly cut off, it was agreed that it would be received and distributed among the consignees *pro rata*; that a copy of said receipt is hereto attached, marked 'exhibit (B),' and is made a part of this answer.

The original will be produced upon the trial, if required.

"7. Respondents are informed, that the tide ebbs and flows some distance above the point where said boat was captured as aforesaid; that the officers and crew had no arms, but acted in good faith, and did all in their power to save said boat and cargo; that said boat and cargo was captured by a number of lawless, roving robbers, at a point on the Bigbee river where the tide ebbs and flows, and within the admiralty jurisdiction of the United States; that by an act of the congress of the United States, said act of robbery is declared to be piracy; and that neither the boat nor the owners are liable for the act as aforesaid, if the officers and crew acted in good faith, and did all in their power to save said boat and cargo.

"8. Respondents are informed, that it is the universal practice and understanding among steamboat-men navigating the waters of the Bigbee river, that when cotton is received by a boat, to be transported to Mobile, if she should be captured by an armed force, without any fault or neglect of the officers and crew, in such case neither the boat nor owners are liable for such loss."

On the trial, as the bill of exceptions states, Boon & Co. read in evidence the libels in the other two cases; and the respondents read in evidence their answers in the other cases, and admitted the due execution of the several bills of lading, and the receipt of the cotton as therein specified. "It was then agreed that the three cases should be tried upon the same issue; and the case of Boon & Co. was selected as the case. The libellants, by their counsel, excepted to so much of the answer to the libel as is in the following words"—viz., the seventh paragraph above set out—"as being insufficient in law to bar a recovery, because a capture above tide-water, within the body of a State, was no bar to the action. The court sustained this exception, and the respondents, by their counsel, excepted.

"Respondents, by leave of the court, filed an amendment to their answer; in which they alleged, that said boat was regularly licensed and enrolled at the custom-house in the city of Mobile, Alabama, under and in pursuance of the laws of the United States, on the 11th day of October, 1865;

that said boat procured a clearance from the custom-house, to-wit, in the city of Mobile, Alabama, for the city of Columbus in the State of Mississippi; that she was regularly engaged in navigation and commerce between said cities of Mobile and Columbus; that on her downward trip from Columbus, to-wit, on or about the 25th January, 1866, the cotton which is the subject-matter of this suit was lost, while said boat was engaged in navigation and commerce between said cities of Columbus and Mobile; that said boat returned to Mobile, and again, to-wit, on the 3d day of February, 1866, procured a clearance at the custom-house in Mobile, for the city of Columbus, Mississippi, but was libelled in this case and others before she left; and they insisted, that the city court of Mobile had no jurisdiction in said cause. The libellants, by their counsel, excepted to the foregoing allegation, upon the ground that it was not sufficient to bar the action. The court sustained the exception, and the respondents excepted.

"The respondents then amended their said answer, by leave of the court. The libellants excepted to each allegation, and their exceptions were sustained by the court; to which the respondents excepted." The amended answer, which was made an exhibit to the bill of exceptions, was in the following words:

"1. Respondents say, they are informed and believe that it was agreed and understood, by and between the captain of said boat and the libellants, at the time the said bills of lading were made and said cotton was shipped on said boat, that if said boat was captured and robbed, on her downward trip to Mobile, by an armed body of men, without any fault or neglect on the part of the officers and crew of said boat, and said cotton should be thereby lost, that such loss was to be borne by the owner of said cotton, and neither the said boat nor owners were to be liable for said loss; that said agreement would have been reduced to writing, and incorporated in said bills of lading given for said cotton, but for the reason that said captain was led to believe, and did believe, from the representations of libellants, that a custom prevailed on said river, which made it unnecessary to incorporate said agreement in said bills of

lading: that is to say, that libellant represented to said captain, that, in point of fact, such a custom did exist on said river; and said captain believed said representations to be true, and received said cotton, and caused said bills of lading to be given for it, as aforesaid, without incorporating in the said bills of lading as aforesaid said agreement; that this would not have been done, but for said representation as aforesaid by said libellant; that the supreme court of Alabama have since, as respondents are informed, decided, in effect, that in point of fact no such custom existed, or could exist, because to establish it by proof would be to contradict the written contract. Respondents therefore insist, that said contract was entered into by mistake of fact, to-wit, as to the existence of such custom as aforesaid, at the time said cotton was shipped and said contract was made as aforesaid, and at the time said bills of lading were given as aforesaid.

"2. Respondents, further answering, insist that said bills of lading were obtained by fraud and misrepresentation, in this, that they are informed that said libellants, before said bills of lading were signed and delivered, informed the captain of said boat that a custom existed on the Tombigbee river, that when cotton was shipped on board of a steamboat, to be transported to Mobile, that if the boat should be captured by an armed body of men, and robbed, while descending said river, and said cotton thereby lost to the owner, that neither the boat nor owners were to be liable for said cotton, when in truth, as they are informed, no such custom existed; that said libellants, as respondents are informed, represented to said captain, before said cotton was shipped as aforesaid, and before said bills of lading for said cotton were signed, that such a custom as aforesaid did exist on said river, and that it was not necessary to incorporate it in said bills of lading, because, if said boat was thus robbed, and the cotton lost to the said owners, without any fault or neglect of the officers or crew of said boat, that the said boat and the owners thereof were in no way liable for the loss; and that said captain, believing said statement of facts to be true, received said cotton

without inserting in said bills of lading the exception of being robbed as aforesaid by armed robbers, without any fault or neglect of the officers or crew of said boat, while said boat was descending said river as aforesaid. Respondents therefore insist, that said false representation was a fraud upon said captain and owners of said boat, and that said bills of lading were obtained by the fraud and false representations of the said libellants, which, if they had not been made, as respondents are informed, said captain would not have received said cotton on said boat, and would not have allowed said bills of lading to have been signed, or delivered to said libellants for said cotton as aforesaid."

"The libellants introduced evidence tending to show, that all the cotton received was not delivered, and that the value of that not delivered was four thousand dollars; also, tending to show that said sum of four thousand dollars covered the loss of all three of the libellants. The respondents now claim an appeal, in open court; and it is granted, upon the respondents giving sufficient bond for costs. And it is admitted, by the libellants, that said boat was robbed upon tide-waters in the State of Alabama, about one hundred miles above the city of Mobile, without any fault or neglect of the officers or crew of said boat."

The decree of the court, after ordering that the three cases be consolidated, proceeds thus—"And now on this day came the several libellants and respondents, by their counsel, and this cause, having been regularly continued until this day, is submitted to the court for a final decree. And the respective libels, answers, and evidence, being duly considered by the court, it is adjudged, that the allegations contained in the said libels are true; that the several claims therein propounded are valid liens on said steamboat, her tackle, apparel, and furniture; that the claim of Boon & Co., as set forth in their libel, has been sustained by proof, to the amount of one thousand dollars, for which they are allowed a decree, with their costs; that the claim of J. H. & S. B. Steers, as set forth in their libel, has been sustained by proof, to the amount of fourteen hundred dollars, for which they are allowed a decree, with their costs; that the claim of John Watson & Co., as set forth in their

libel, has been sustained by proof, to the amount of sixteen hundred dollars, for which they are allowed a decree, with their costs. And it is further ordered, that the said steamboat *Belfast* with her tackle, apparel, and furniture, be exposed at public sale, in front of the courthouse-door, by the sheriff of Mobile county; that he give ten days' previous notice of the time and place of making such sale; and that out of the proceeds of the sale of said steamboat, he satisfy the several decrees in this case, and the costs, and, if there be any residue left in his hands, that he pay the same to the parties entitled by law to receive it."

The appeal is sued out by said Nelson and Hurtel, who here assign as error all the rulings of the city court, to which, as above stated, they reserved exceptions, and also the final decree.

W. BOYLES, for the appellants.—1. By section 2692 of the Code, a lien is given for work done, and materials furnished, within the State. The act of 1864, entitled "An act to amend the admiralty laws of this State," gives a lien for freight not delivered, to be enforced in the same manner, and governed by the same rules, &c., as prescribed by the Code. This act was simply intended to give the same lien for freight not delivered, as was given by section 2692 for materials furnished. These statutes must be construed in *pari materia*. They are *strictissimi juris*, and must be strictly construed: they can not be extended by construction, analogy, or inference.—19 Howard, 89; 2 Curtis, 404, and cases there cited. As to the general rules of construction applicable to such statutes, see 1 Brock. 23-4; 4 Gilm. 207; 10 Pick. 506; 7 Blackf. 556. The act of 1864 does not specify where the freight is to be received, nor where it is to be delivered; but it must be construed to apply only to boats navigating the wholly interior rivers of the State. To construe it as applicable to vessels engaged in navigation and commerce between two or more States, would make it, to that extent, unconstitutional and void. The failure to deliver freight by a vessel licensed and enrolled under the laws of the United States, and engaged in commerce between the States, creates a maritime lien, which

can only be enforced in the Federal courts. The jurisdiction of the United States courts, in admiralty and maritime cases, is given in general terms by the constitution, and is exclusive of all jurisdiction in the State courts. Where a boat is engaged in navigating waters altogether within the limits of the State, the State courts have jurisdiction; but, where she is engaged in navigation and commerce between two or more States, the jurisdiction of the Federal courts is exclusive. These principles are sustained, and enforced by conclusive reasoning, in the following cases: 5 Wheaton, 1, 21; 9 Wheaton, 196-222; 14 Peters, 540, 569, 579; *Jackson v. Steamboat Magnolia*, 20 Howard, 304; *Sinnot v. Davenport*, 22 Howard, 227; 19 Howard, 89; 19 Missouri, 518; 9 Indiana, 525; 17 Iowa, 349; 2 Story's C. C. R. 464; 1 Black's U. S. R. 522, 579. In the cases of *McGuire v. Card*, (21 Howard, 248,) and *Chopper v. Boston Belting Co.*, (22 Howard, 217,) Federal jurisdiction was denied, because the boat was, in each case, engaged in the purely internal navigation of the State. The case of *Newberry v. Allen*, (21 Howard, 244,) turned upon the construction of the act of 1845; and it does not overrule or militate against the decision in the case of *Jackson v. Steamboat Magnolia*, *supra*.

2. The boat was captured upon tide-waters, and robbed, without any fault or neglect on the part of the officers or crew. Robbery on tide-waters is declared piracy by the act of congress of 1820.—1 Brightly's Digest, 208, § 35; 5 Wheaton, app. 148, note 4. This act of congress is founded on the constitutional grant of power "to define and punish piracy," committed on the high seas. Waters within the ebb and flow of the tide are arms of the sea. Gilpin's R. 526; Baldwin's C. C. 15. Piracy being one of the exceptions to the liability of a common carrier, robbery on tide-waters comes within the exception in this country.—Abbott on Shipping, 476-7; Story on Bailments, § 512; 4 McLean, 259; 3 Kent's Com. 278; 3 Stew. & P. 176, and cases cited; 2 Conkling's Admiralty, (2d ed.) 160; 1 Parsons on Contracts, 638; 1 Black's U. S. R. 487.

3. The court erred in sustaining the exception to the allegations of fraud and mistake in procuring the bills of lading. That parol evidence is admissible to show a mis-

take in a bill of lading, see 3 Iowa, 268; 13 Metcalf, 517; 20 Ohio, 147; 6 McLean, 487; 3 Wash. C. C. 5; 6 Cranch, 338; 1 Sumner, 218; 2 Sumner, 387. The existence or non-existence of a local custom is a question of fact.—29 Ala. 200; 25 Ala. 498. As between the shipper and the common carrier, the bill of lading is not conclusive, but may be rebutted by proof of mistake or fraud.—1 Parsons on Maritime Law, 143; 13 La. Ann. R. 452. Parol evidence of fraud is admissible, although the contract has been reduced to writing.—*Blackman v. Johnson*, 35 Ala. 252; *Dixon v. Barclay*, 22 Ala. 370. The allegations of the answer make out a case of fraud, although it is not averred that the libellants knew the falsity of the representations at the time.—16 Ala. 785; 34 Ala. 663; 29 Ala. 668; 27 Ala. 203; 35 Ala. 253; 21 Ala. 714; 11 Ala. 345; 9 Ala. 662; 4 Scam. 596; 4 How. (Miss.) 435; 4 N. H. 348; 7 E. D. Smith, N. Y. 238; 2 Barr, 240; 6 Missouri, 59; 26 Geo. 74; 35 Penn. 23; 46 Maine, 303; 22 Pick. 546; 6 McLean, 95. In cases of fraud, a court of law has concurrent jurisdiction with a court of chancery.—8 Peters, 244; 12 Peters, 11. Courts of admiralty, moreover, “act upon the enlarged and liberal jurisprudence of courts of equity.” 2 Parsons on Maritime Law, 649; 2 Sumner, 243; 2 Greenl. Ev. §§ 388–89.

4. The record does not set out sufficient evidence to sustain the decree, as required by the rules of practice in admiralty cases.—1 Sumner, 328; 7 Cranch, 789; Gilpin's R. 37; 10 Wheaton, 431; Dunlap's Admiralty, 79.

E. S. DARGAN, *contra*.—1. At common law, an action could have been maintained on the bill of lading, for a non-delivery of the cotton. The State certainly has the constitutional authority to prescribe the manner in which that liability may be enforced; whether by action at law, by bill in equity, or by a proceeding in the nature of a libel in admiralty. The grant of admiralty jurisdiction to the courts of the United States gives them exclusive jurisdiction of all matters which can only be adjudicated in admiralty, but not of all matters which by statute may be made cognizable in courts of admiralty, nor of all suits which may be

conducted according to the rules of admiralty practice. Where the matter is cognizable at common law as well as in admiralty, the jurisdiction of the Federal and State courts is concurrent.—*Taylor v. Carryl*, 20 Howard, 598; 7 Ala. 59. The act of 1864 was a legitimate exercise of the constitutional power of the State, and was intended to give a lien on all steamboats navigating the interior waters of the State, for a failure to deliver freight at the place within its limits designated in the bill of lading. The failure to deliver the freight, at the place stipulated, creates the lien, and gives the cause of action; and the place of shipment is immaterial.—6 Ala. 50.

2. Robbery does not excuse the liability of a common carrier. The act of congress of 1820, declaring robbery on tide-waters to be piracy, can not change the civil rights or liabilities of third persons, growing out of the unlawful act.

3. The plea of fraud, as set up in the amended answer, is negatived by the allegations of the original answer; and, therefore, the exception to it was properly sustained. If the matter of the plea had been properly presented, it would have constituted no defense.

BYRD, J.—1. It seems to be the settled law of England, that the maritime lien which a shipper has upon a vessel, for an injury to his goods, can not be enforced in a court of admiralty.—*Abbott on Shipping*, 127; *Birley v. Gladstone*, 3 M. & S. 205; *Gladstone v. Birley*, 2 Mer. 401; *Pierson v. Robinson*, 3 Swanst. 139, n. But in this country the rule is otherwise.—*Clark v. Barnwell*, 12 Howard, 272; *Rich v. Lambert*, *ib.* 347; *Schooner Volunteer*, 1 Sumner, 551; *The Gold Hunter*, 1 Bl. & Howl. Adm. 300; *The Boston*, *ib.* 309.

Whether this lien attaches in fresh-water navigation, or where the water is partly fresh and partly tidal; whether on vessels employed exclusively in State or inter-State trade; whether, where it does attach, the admiralty courts of the United States have exclusive jurisdiction or not; and if not, in what cases it is exclusive, and in what the States have concurrent and independent jurisdiction; these, and cognate questions, have been subjects of discussion in this

country, and upon some of them the adjudications have been variant and conflictive. Without attempting a review of the cases, we will cite the leading ones : *De Lovio v. Boit*, 2 Gallis. 398 ; *Ramsay v. Allegre*, 12 Wheat. 614 ; *The Gen. Smith*, 4 ib. 438 ; *Hallett v. Novion*, 14 John. 273 ; 16 ib. 327 ; *The Thomas Jefferson*, 10 Wheat. 428 ; *Waring v. Clarke*, 5 How. 441 ; 6 ib. 344 ; *Parour v. Howard*, 7 Pet. 524 ; *Orleans v. Plabus*, 11 Pet. 175 ; *The Commerce*, 1 Black, 574 ; *The Genesee Chief*, 12 How. 443 ; *Fretz v. Bull*, ib. 466 ; *The Magnolia*, 20 ib. 296 ; *Pierce v. Page*, 24 ib. 228 ; *Stokes' Case*, 22 ib. 48 ; *Allen v. Newberry*, 21 ib. 244 ; *The Niagara*, ib. 7 ; *Sturges v. Clough*, ib. 451 ; *Taylor v. Carryl*, 20 ib. 583 ; *Gilman v. Philadelphia*, 3 Wallace, 713 ; and cases cited in the foregoing, and on brief of counsel in this cause.

In the case cited from 3d Wallace, Justice Swayne, delivering the opinion of the court, says : "The States may exercise concurrent or independent power, in all cases but three : 1st, where the power is lodged exclusively in the Federal constitution ; 2d, where it is given to the United States, and prohibited to the States ; and, 3d, where from the nature and subjects of the power it must necessarily be exercised by the national government." In that case he further says : "The power here in question does not, in our judgment, fall within either of these exceptions." That case, in its facts, was not like this, but in principle we can see no substantial difference.

In the case of *Taylor v. Carryl*, (*supra*,) Justice Campbell, delivering the opinion of the court, quotes approvingly from Judge Story, as follows : "Mr. Chancellor Kent and Mr. Rawle seem to think, that the admiralty jurisdiction given by the constitution is in all cases necessarily exclusive. But it is believed that this opinion is founded in mistake. It is exclusive in all matters of prize, for the reason that, at common law, this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But, in cases where the jurisdiction of the common law and admiralty are concurrent, (as in cases of possessory suits, mariners' wages, and marine torts,) there is nothing in the constitution necessarily leading to the conclusion, that the jurisdiction was intended to be exclusive. * * * But

the States might well retain and exercise the jurisdiction, in cases of which the cognizance was previously concurrent in the courts of common law."

From these principles we conclude, that the States have the power to confer on their courts the jurisdiction to enforce a maritime lien, arising within their respective limits, where, by the common law, such courts had jurisdiction of the subject-matter. At common law, a shipper, on a vessel engaged in either foreign or internal navigation, could bring a suit in the common-law courts, to recover damages for any injury to the goods shipped by him, for which the owner of the vessel was liable. Seamen have a lien on the vessel, for their wages earned in her service, which they could enforce in a court of admiralty; and they also had a remedy by an action in a court of common law, for services rendered, against the owner of the vessel, or the person on whose account the vessel was running; and we see no reason why the State legislature is not competent to authorize its courts to enforce that lien, *even* in a suit in the nature of an admiralty proceeding, without in the least interfering with the admiralty jurisdiction of the courts of the United States.

We see nothing in the case of *Jackson et al. v. Steamer Magnolia*, (*supra*,) in conflict with these views. That case only decides, that the Federal courts have jurisdiction of a *marine tort*, committed within a county of a State, and above tide-water. It does not hold that the jurisdiction is exclusive in those courts over such torts. The supreme court of the United States have not been harmonious in their decisions upon this and kindred questions, and the members of the court have, on several occasions, been nearly equally divided; as, in the cases of the *Steamer Magnolia*, *Taylor v. Carryl*, and *Gilman v. Philadelphia*, *supra*. This court has heretofore passed upon the jurisdictional question involved in the decision of this cause.—*Richardson v. Cleaveland*, 5 Porter, 251; *Steamer Morris v. Williamson*, 6 Ala. 50; *Steamer Farmer v. McCraw*, 31 Ala. 659.

From these decisions, and those above cited, we deduce the following propositions: That, by the maritime law, a shipper has a lien on the vessel, for any damages to his

goods, for which, by the common law, he could maintain an action; that this lien was not enforceable in a court of admiralty in England; that such a lien may be enforced in the courts of the United States having admiralty jurisdiction; that their jurisdiction is not exclusive in all cases, but the State legislatures may confer on their courts the authority to enforce such lien by a suit in the nature of an admiralty proceeding, in all cases, *where*, by the common law, the State courts would have jurisdiction of the subject-matter of the suit, *and* the contract of shipment was made, the damage done, and the place of delivery under the contract was to be, within the jurisdictional limits of the State. We thus limit the proposition, for the reason that the facts of this case are within the limitations laid down.

Whether by the maritime law any lien exists in favor of a shipper for an injury to his goods, against the vessel upon which they are laden, navigating exclusively the rivers of a State or country above tide-waters, although the tides flow from the ocean or bays up such river a considerable portion of their navigable course, is a question not necessary for us to decide in this case. If that law did not give such a lien in such a case, then it seems clear to us, that the State legislature *could* declare such a lien, and *authorize* its enforcement in its courts.

We have discussed the question as though such a lien, in such a case, was given by the maritime law; and in that view we hold, that the weight of authority sustains the constitutionality of the act of the 7th October, 1864, under which this proceeding was commenced, *at least* to the extent contended for by the counsel for *Boon & Co.* As to the other libellants, the bill of exceptions shows, that "it was agreed that all three cases should be tried upon the same issue, and the case of *Boon & Co.* was selected as the case." If *Boon & Co.* are entitled to recover, then the effect of the agreement is to authorize a recovery in favor of the other appellees.

2. At common law, a common carrier, who was deprived of goods by pirates, was excused from liability, if without fault himself, to the owner or consignee. Robbery was no defense. Congress has declared, by an act approved in

1820, that any person, who shall, upon the high seas, or in any river where the tide ebbs and flows, &c., commit robbery, and be convicted thereof, shall be adjudged to be a pirate, and punished with death.—1 Brightly's Digest, p. 208, § 35. This act seeks to protect the carrier, by punishing the offender as a pirate, and not as he would be, if left to the State courts, as a robber, and by a heavier penalty than robbery is generally punished by the State laws. It appears to us to be a violation of the received rules of interpretation, or acceptation of legal terms and definition of crimes, to hold that the persons who robbed *The Belfast* are pirates within the meaning attached to that term by the common or maritime law; and it would be equally violative of legal principles and justice to hold, that a law which adjudged and punished them as pirates, would therefore relieve the carrier who had been so robbed from a common-law liability arising from the contract of shipment.

In the case of *The United States v. Jackalow*, (1 Black, 487,) the supreme court say, that it is competent for congress to prescribe the punishment of offenses committed on the high seas, in any haven or bay, or in any river where the sea ebbs and flows, although within the limits of a State. Without questioning, *at this time*, the doctrine thus *broadly* laid down, still we do not see how congress can, by a criminal law, change or modify the civil liabilities of persons contracting within a State. If so, it would seem that congress might, by declaring that larceny, or embezzlement, on any vessel by any officer thereof, or other person, upon the high seas, or any river where the tide ebbs and flows, within the limits of a State, was piracy, *relieve* the carrier from liability for goods or money thus stolen or embezzled. A criminal law should not be construed in derogation of civil liabilities imposed by the common law and by contract, nor should it be given an effect beyond the legitimate objects of the law—the prevention of crime, and the punishment of the offender.

3. The counsel of the appellant contends, that the court should not have sustained the exceptions to the amended answer, set out in the record as "Exhibit W" to the bill of

exceptions. Neither the exhibit, nor the bill, shows what the exceptions were. If, therefore, any valid exception could have been taken, we must presume, in support of the ruling of the court, that it was taken. The counsel for appellees insist, that this amendment is repugnant to the original answer, and that therefore the court properly sustained the exception to it. Such an objection to the filing of the amended answer *might* have been well made; but, after the court had allowed the party to file it, such an exception, under the liberal system of pleading tolerated in modern times, and by our Code, would come too late, and ought not to prevail.

4. The first plea, in the amended answer, is founded upon an alleged mistake in the contents and execution of the bill of lading. Such a mistake, if available in any court, can not be invoked by the appellant as a defense to the libel, in the form here pleaded. It is averred, that the "contract of shipment was entered into by mistake of fact, to-wit, as to the existence of such custom," &c. A mistake made in the contents of a written contract can not be taken advantage of by way of defense, in a court of law or equity, but, to avail himself of it, the party must become the actor in a court of equity for the reformation of the contract.—*Hogan v. Smith*, 16 Ala. 622; 1 Story's Eq. Ju. §§ 111, 116, 120-6-8, 137, 146-9, 150-3-8.

5. The second plea sets up fraud and misrepresentation of the several libellants in procuring the execution of the bills of lading; and it is, therefore, contended by the counsel for appellant, that no recovery can be had on the bill of lading, or in this proceeding. A question of some intricacy is presented by the contents of this plea. The law, as to the effect of fraud upon all contracts, is clear and well defined; and we shall, in the course of this opinion, refer only to so much of that law as is applicable to the contents of this plea. In passing upon the matters set out in the plea, we will refer to two reflections which claim some notice. One is, that the captain of a steamboat, engaged in navigating a river, should be deceived by the representations of others as to the existence of a custom, which vitally affected the liabilities of the vessel or its owners, in whose service

he was employed. The other is, that he should have so readily declined from putting a clause in the bill of lading, upon a representation that the custom of the river rendered it unnecessary; if such was the fact, why should the shippers have objected to its insertion? The very objection by them was sufficient to have put the captain on his guard, and made him insist on putting in the bill of lading the exception of loss by robbery; for, if such exception had been established by custom, the shippers could not have been injured by its insertion, *if* such a custom could be set up against the common law,—which this court has held could not be done.

And here lies the difficulty of the case. Taking the averments of the plea to be true, it seems to us that the representations made, related to both matters of fact and law. As to the latter, the captain, in contemplation of law, was not ignorant; and as to matters of fact, whether he knew them to be true or not, he seems to have been negligent in acquiring a knowledge of a custom affecting the business in which he was engaged, and as to the existence of such a custom, if it existed, as to which he ought to have been as well acquainted as the libellants, if not better; and there was no relation existing between the parties, which authorized the captain to rely upon the representations alleged to have been made, without inquiry. Ordinarily, a fraudulent misrepresentation of a matter of law is no ground for an action or relief.—*Martin v. Wharton*, 38 Ala. 637. A misrepresentation of a matter of fact may be. A custom, to have the force and effect of law, must conform to all the rules laid down in the books; and though its existence may be a question of fact in one sense, yet its effect is matter of law; and as to the latter, it is a trite maxim, *ignorantia legis neminem excusat*; nor can a fraudulent misrepresentation of the *effect* of law upon a given state of facts, *ordinarily* afford any right to relief, or any defense to an action.—*Juzan v. Toulmin*, 9 Ala. 684; *Cowles v. Townsend*, 37 Ala. 77; *Hogan v. Smith*, *supra*; 1 Story's Eq. Ju. §§ 191-7-9, 200 a; 2 Kent, 484-86, 4th ed.

A party who sets up a fraudulent misrepresentation of facts, as a ground of relief or defense, must not be guilty

of laches; and if it appears that he did not use ordinary diligence, in acquiring a knowledge of the facts, and that he did not stand in a relation to the party making the representations, which authorized him to rely upon them without inquiry, he can not avail himself of such representations as a ground of relief or defense. No such relation is set up or insisted on in this case, and the captain acted on the representations, alleged to have been made, improvidently, if not recklessly, in a matter as to which he ought to have been as well informed as the libellants; and the very assertion which they made as to the custom, and objection to its insertion in the bill of lading, should have put the captain on the inquiry. Taking all these views together, we are of opinion, that the plea under consideration is insufficient and defective, and the court therefore properly sustained the exceptions thereto.—See authorities last cited.

The record does not purport to set out all the evidence, and if the evidence set out was not sufficient, we would presume that there was sufficient introduced to authorize the decree of the court below.

The foregoing disposes of all the questions raised, and so thoroughly argued by the learned counsel for both parties, at the bar and in writing; and, as we are not able to detect any error assigned upon the record, the decree of the court below must be affirmed, with costs.

BYRD, J.—Since writing the foregoing opinion, the case of the steamboat *Ad. Hine v. Trevor*, decided at the December term, 1866, of the supreme court of the United States, and in manuscript, has been brought to our notice by appellant's counsel; and he earnestly insists that it is decisive of this case. We were not aware that such a decision had been made, and we consider it as settling clearly some of the questions to which we refer in our opinion as being unsettled; and upon the facts of that case, there can be no doubt of the correctness of the result attained by the court. The main fact in that case, which was decisive of the question of the jurisdiction of the courts of Iowa, is, that a State can neither confer a lien, nor enforce a right,

arising under the maritime law of the United States, or by statute of a State, where a marine tort takes place out of the limits of the State, and in another State. That was a question involved in the decision of that cause, and that decision must be the law of this court.

Mr. Parsons, in his work on Maritime Law, says: "In fourteen of our western and southern States, actions may be brought against vessels by name. * * * But in these States, it seems, that actions of this sort will not be sustained under their statutes, if the cause of action arose out of the State." This view would have been decisive of the case of the *Ad. Hine*, *supra*. Mr. Parsons further says (vol. 2, p. 510): "The act of 1845, relating to the lakes and navigable waters connecting the same, gives no jurisdiction over the domestic commerce of a State—that is, over contracts for carrying goods between ports and places in the same State;" and he cites the case of *Allen v. Newberry*, 21 How. 244.

Mr. Parsons is speaking of the jurisdiction of the United States courts as courts of admiralty, in the above extract. In the case of *Allen v. Newberry*, it is decided, that the jurisdiction of those courts does not extend "to a case where there was a shipment of goods from a port in a State, to another port in the same State, both being in Wisconsin." Nelson, J., delivering the opinion of the court, says: "In the case of *Gibbon v. Ogden*, (9 Wheat. 194,) it was held, that this power did not extend to the purely internal commerce of a State;" and he quotes the following extract from the opinion of Chief-Justice Marshall in that case: "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, when they do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then," he observes, "may be considered as reserved for the State itself." Justice Nelson, in the same case, quotes from the case of *The New Jersey Steam Navi-*

gation Company v. Merchants' Bank, (6 How. 392,) as follows: "Contracts growing out of the purely internal commerce of the State, &c., are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the Federal courts."

The case of *Allen v. Newberry* is "on all fours" with the case under consideration. In that case, the boat was running between a port in Wisconsin and one in Illinois; and in the case before us, the boat was running between a port in Mississippi and one in Alabama; and in both cases, the goods were shipped at a port in one State, to be delivered in another port in the same State.

In the case of the *Ad. Hine*, the court has not considered the case of *Allen v. Newberry*; and it was not necessary to do so, for it does not lie within the same field of maritime jurisdiction—*marine torts and contracts of affreightment*. To reverse this case, we would have to disregard the case of *Allen v. Newberry*; which we are not disposed to do, but will leave it for the consideration of the supreme court of the United States, whether the case of the *Ad. Hine* is in conflict with that case. We do not think that there is any conflict. If in this case we are mistaken, it will give that court an opportunity to settle another question as to the admiralty jurisdiction of the Federal courts.

The distinction we make may be thus stated: Neither by the common law, nor by the maritime law, had the shipper any lien on a vessel for goods laden on and lost by it, where the vessel was navigating rivers or waters within the body of a county; and we can not see how the grant by the Federal constitution, of all admiralty and maritime jurisdiction, to the circuit courts of the United States, can create a maritime lien in favor of a shipper, where the contract of affreightment is made, and the goods are shipped, and are to be transported to a place within the body of a State. We can find no authority whatever for such a doctrine. It is unnecessary to consider whether, by the maritime law of Europe, a shipper has such lien against vessels navigating the Seine, the Danube, the Rhine, or Vistula, without going out to sea, or beyond the limits of the kingdoms within which they respectively have their course. For those king-

doms, or most of them, are governed by the civil, and not by the common law ; and it is well settled, that the common law of England is the common law of this country, so far as it is accommodated to, or modified by our institutions ; and to hold that a shipper's lien exists by the maritime law, on a vessel running exclusively the rivers of a State, would be a confusion of terms and ideas wholly unknown to, and unrecognized by, the common law or the maritime law of England or this country. We admit, that it may be competent for congress to declare such a lien, under the grant of power to regulate commerce between the States. But we are not aware that congress has ever done so ; and in the absence of congressional legislation, it is competent for the States to declare such a lien to exist upon the vessels running within their limits, upon contracts of affreightment made within their jurisdiction, and to be executed within the same.

By way of illustration, take the case of a steamboat running between Rome, in Georgia, and the Ten Islands in the Coosa river, in Alabama, on a portion of that stream which has no navigable connection with tide-water. Can a maritime lien, in favor of a shipper on such a boat, be said to exist by the maritime law, or by any act of congress ? If so, we are not aware of it. If, as in the case of *Allen v. Newberry*, no such lien is declared in such a case by the act of congress of 1845, on the north-western lakes and rivers, we can not see how such a lien exists under the act of 1789, or by the maritime law. Besides, if the act of 1845 did not declare such a lien to exist on those lakes and rivers, still the act of 1789, and the maritime law, were then in force throughout the whole extent of our country ; and if such a lien did exist under the latter act, or by the maritime law, of which the admiralty courts of the United States had exclusive jurisdiction, the court would have so declared in the case of *Allen v. Newberry*. All the decisions—from the existence of the government—of the United States courts, have uniformly held that such a contract of affreightment as was made in this case, was not within the jurisdiction of the United States courts ; and all the State courts and legislatures have so held ; and under the adjudication

of the *Moses Taylor* and *Ad. Hine*, we do not feel that we are authorized to depart from them. We do not consider those cases as touching the point of this, or as overruling *Allen v. Newberry*. We concede, that the question has, perhaps, become somewhat involved in difficulty by those cases; and even if we thought they had rendered the question doubtful, it might be our duty, if such a practice prevailed, to certify it to the supreme court of the United States, as novel and difficult; and not being able to do so, to decide the case as we have done, so as to permit the only party who can, to appeal to that final tribunal.

This case raises points, which, perhaps, will enable that court to lay down a rule which will finally settle the questions left open by the case of the *Ad. Hine*. If the State had the power to give a lien by law, to a shipper on a vessel in such a case of affreightment as this, then we hold, that the State could also confer the jurisdiction upon their courts to enforce such a lien, and that they could do so by a process of foreign attachment, or by a proceeding in a common-law court in the nature of an admiralty proceeding. We can see no substantial reason why one form is more objectionable than the other; for, whilst we concede that the States have no authority to establish courts of admiralty, we can not see why the States could not adopt admiralty forms and proceedings, where applicable, to try civil causes, preserving, as the statute does in this case, the right of trial by jury. We therefore adhere to the conclusion attained in the former opinion, and modify the reasoning thereof, to the extent it has been overturned by the cases of the *Moses Taylor* and the *Ad. Hine*, and no further.

A. J. WALKER, C. J.—By the second section of the third article of the constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction. The ninth section of the act of congress of 1789 declares, that the district courts of the United States shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction.—1 Brightly's Digest, 24. Whatever may have been the earlier ad-

judications of the Federal and State courts, and the deliverances of the American law-writers, the late decisions of the supreme court of the United States establish, in my judgment, the following propositions: 1st, that the admiralty jurisdiction bestowed by the 9th section of the act of congress of 1789, on the district courts of the United States, excludes all admiralty jurisdiction by the State courts, and that that act is constitutional; 2d, that a contract of affreightment has an admiralty lien on the vessel, which may be enforced by libel, and that jurisdiction over such contracts and liens appertains to the district courts of the United States, under the provisions of the constitution and the act of 1789; 3d, that this jurisdiction extends to contracts of affreightment made and to be executed upon an interior river, above tide-water, and within the territorial limits of a single State; and, 4th, that the proceeding under the Alabama statute in this case is an admiralty proceeding, and involves the exercise of admiralty jurisdiction.

From these propositions it results, that the act under which this proceeding was had is in contravention of an act of congress, passed in pursuance of the constitution of the United States, and is void; and the court below had no constitutional jurisdiction of the case. I cite the decisions which, in my judgment, establish the foregoing propositions, with the single remark, made with the utmost respect for my brothers, that they seem to me to be conclusive, and that I yield to them because they are, upon correct judicial principles, binding upon us.—*The Genessee Chief*, 12 How. 443; *The Magnolia*, 20 ib. 296; *The Moses Taylor*, in MSS.; *The Ad. Hine*, in MSS.

I think there is no distinction, so far as the question of jurisdiction is concerned, between those cases in which the admiralty jurisdiction is based upon a marine tort, and those in which it is based upon a contract of affreightment; and that, consequently, the decisions in the former class of cases are applicable to the latter, to which this belongs. The supreme court of the United States has changed its position upon the subject of restriction of its admiralty jurisdiction, so as not to apply to commerce upon navigable interior rivers; and as an appeal lies to the supreme court

of the United States, I think it is our duty to make a corresponding change.

I concur with my brothers in their opinion upon the other points decided.

HAYS, EXECUTOR, &c., vs. COCKRELL, ADM'R, &c.

[FINAL SETTLEMENT OF ACCOUNTS OF DECEASED ADMINISTRATOR.]

1. *Jurisdiction of probate court to settle administration, where administrator occupies antagonistic positions.*—If an administrator dies without having made final settlement of his accounts and vouchers, and his executor is appointed administrator *de bonis non* of his intestate's estate, the probate court has no jurisdiction to settle with such executor his testator's administration of the intestate's estate: nor can the difficulty be obviated by appointing a special administrator, under the provisions of the act of 1863. (Session Acts, 1863, p. 65,) to represent the intestate's estate: the only remedy is in chancery.
2. *Jurisdiction of probate court to settle husband's trusteeship of wife's statutory separate estate; husband's right to emblements in wife's separate estate.*—The cases of *Weems v. Bryan and Wife*, (21 Ala. 302,) as to the jurisdiction of the probate court to settle the husband's trusteeship of his wife's statutory separate estate, and as to his right to the proceeds of the crop planted but not gathered at the termination of the coverture, and *Bennett v. Bennett*, (34 Ala. 53,) as to the latter point, both overruled. (WALKER, C. J., *dissenting*.)
3. *When appeal lies.*—An appeal does not lie from a decree of the probate court, which purports to have been rendered on final settlement of the accounts and vouchers of a deceased administrator, and which shows on its face that the court had no jurisdiction to render it; and an appeal from such a decree will be dismissed by the court, *ex mero motu*. (A. J. WALKER, C. J., *dissenting*.)

APPEAL from the Probate Court of Greene.

IN the matter of the estate of Robert A. Hairston, deceased, on final settlement of the accounts and vouchers of Mrs. Mary Hairston, deceased, his widow and administratrix, by Charles Hays, her executor. The material facts of the case, so far as they are necessary to a correct under-

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standing of the legal questions here decided, were thus stated in the opinion of the court, as delivered by JUDGE, J.:

"Robert A. Hairston and Mary Hays intermarried, in this State, in the month of July, 1856. After the marriage, Robert A. became possessed of a plantation and personal property, which, under the statute law of this State, constituted the separate estate of Mary, his wife. He managed and controlled this separate estate until the period of his death, which occurred in November, 1864. In December of the same year, the said Mary H., who survived the said Robert A. Hairston, as his widow, administered on his estate, and remained the administratrix thereof until the period of her death, which occurred in February, 1865. In the month of March of the same year, Charles Hays was appointed the administrator *de bonis non* of the estate of the said Robert A.; and in November, 1865, he also qualified as the executor of the last will and testament of the said Mary H. Subsequently, Hays reported the estate of his intestate, Robert A., insolvent; and on the 14th of May, 1866, the estate was duly declared insolvent. Hays, as the executor of the said Mary H., then filed in the probate court an account for the settlement of the administration of the said Mary H. on the estate of the said Robert A., and a day was fixed for the settlement. Hays being the executor of one of the estates, and the administrator *de bonis non* of the other, the court considered him as a party in adverse interest to the estate of Robert A., and appointed Samuel W. Cockrell special administrator of the last named estate, for the 'particular proceeding.'—Session Acts, 1863, p. 65. The creditors of the estate of Robert A., though not parties of record, appeared on the settlement, by counsel, in aid of the special administrator.

"It was held by the probate court on the settlement, that the executor of the wife was chargeable with the income and profits of her statutory separate estate, which accrued from her plantation during the year of the husband's death, and were received by her during her lifetime, on the supposed right of the husband to the same as 'emblemments.' It appears that some of the transactions of the said Robert A., as trustee of his wife's separate estate, under the

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Code, were attempted to be settled by the probate court. Divers other questions at issue between the parties were decided by the court, and exceptions were reserved on both sides; and by consent, there are cross assignments of error in this court.

"The probate court decreed, 'that Samuel W. Cockrell, special administrator of Robert A. Hairston, deceased, for the benefit of the estate of the said Robert A. Hairston, deceased, and for the use of the said estate, recover of Charles Hays, executor of the said Mary H. Hairston, deceased, the sum of six thousand and thirty-two 82-100 dollars, for which execution may issue, at the proper time, as authorized by law, to be levied of the goods, chattels, lands, and tenements, belonging to the estate of the said Mary H. Hairston, deceased, in the hands of Charles Hays, her executor, unadministered.'"

All the assignments of error, on both sides, relate to the rulings of the court in the allowance or rejection of items of debit or credit in the settlement of the account, and on questions of evidence therewith connected.

W. P. WEBB, MORGAN & JOLLY, and GEO. GOLDTHWAITE, Jr., for the appellant.—1. The probate court had no jurisdiction, under the peculiar facts of the case, to make a settlement of the wife's administration on the estate of her deceased husband. If the decision in the case of *Weems v. Bryan*, (21 Ala. 302,) on this point, be adhered to, the special circumstances of this case are sufficient to take it out of the influence of that decision.

2. The principal question in this case is, whether the wife's executor, in settling her administration on her husband's estate, can be charged with the rents, income, and profits of her statutory separate estate, which accrued during the year of the husband's death. On this question, it is submitted, there could be little doubt or difficulty, but for the case of *Weems v. Bryan*, (*supra*,) and the subsequent case of *Bennett v. Bennett*, (34 Ala. 53,) in which it was re-affirmed, though with reluctance. Those decisions are directly in the teeth of the statute, and violative of its declared object and purpose. The statute (Code, § 1983)

makes the husband a trustee for life, and declares that the rents, &c., "shall not be subject to the payment of his debts"; while those cases extend his interest beyond his death, and make the rents, &c., in the hands of his administrator, subject, like other assets, to the payment of his debts. It is well settled, that when the objects of a trust are accomplished, the trust is discharged, and the legal (as well as the equitable) title vests in the beneficiary.—*Comby v. McMichael*, 19 Ala. 747; 21 Ala. 458; 30 Ala. 143–52. In the case of the wife's statutory separate estate, the object of the trust is the support and maintenance of the family.—*Boaz v. Boaz*, 36 Ala. 334. The claim of the husband's creditors certainly can not be superior to the rights of the wife. They could assert no claim against the rents and profits in his hands during his life. If they have any claim on the trust estate, for advances made, &c., they can assert it by an appropriate proceeding in equity; while the assets in the hands of the administrator, the estate being insolvent, must be distributed *pro rata* among all the creditors. The case of *Weems v. Bryan*, though re-affirmed in *Bennett v. Bennett*, is at variance with the later cases of *Boaz v. Boaz* and *Patterson v. Flanagan* (37 Ala. 513); and in the case last cited, the court declare an intention not to extend the principle of that decision. The case of *Weems v. Bryan*, it is respectfully submitted, ought to be overruled; and even if it be adhered to as a settled rule of property, or on the doctrine of *stare decisis*, it ought not to be extended to this case.

JAS. B. CLARK, J. G. PIERCE, and W. COLEMAN, *contra*.

1. The jurisdiction of the probate court, to settle the husband's trusteeship of his wife's statutory separate estate, in ordinary cases, is settled by the decision of this court in *Weems v. Bryan*, 21 Ala. 302. So far as the antagonistic positions occupied by the executor presented any difficulty, it was obviated by the appointment of a special administrator, under the provisions of the act of November 27, 1863, which was intended to apply to precisely such cases.

2. The case of *Weems v. Bryan* is conclusive, also, as to the husband's right to *emblems*—that is, to the proceeds

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of the crop planted but not gathered at the time of his death. That decision was made more than fifteen years ago. It has been assailed in argument, at the bar of this court; but has been expressly re-affirmed, in at least one case, and recognized and approved by citation in many others. — *Bennett v. Bennett*, 34 Ala. 53; *Whitman v. Albernathy*, 33 Ala. 154; *Rogers v. Boyd*, 33 Ala. 181; *Alexander v. Saulsbury*, 37 Ala. 377; *Patterson v. Flanagan*, 37 Ala. 513. It has thus become a settled rule of property, which has received the silent recognition and acquiescence of the legislature. If it had worked any great injustice, or public inconvenience, it is fair to presume that the principle established by it would, ere now, have been changed by statute. Regard for vested rights, and for the stability of judicial decisions, requires that it should be sustained and upheld.

JUDGE, J.—(After stating the facts as above quoted.) The first question we shall consider is this: In the particular aspect of the case, as to parties, and the interests involved, had the probate court jurisdiction to make the settlement?

Prior to the passage of the act of January 27, 1845, the probate court had no jurisdiction to compel the representative of a deceased executor, or administrator, to settle the accounts between the deceased executor, or administrator, and the estate which he represented. The parties whose rights were affected by a *devastavit*, or conversion of the goods of the decedent, by the previous executor, or administrator, were compelled to resort to a court of equity for relief.—*Taliaferro v. Bassett*, 3 Ala. 670; *Snedecor v. Carnes*, 8 Ala. 665. To give the probate court jurisdiction of such a settlement, the act of 1845 was passed, which was repealed by the adoption of the Code, but re-enacted, in substance, in 1854.—Acts 1853-'4, p. 24. Whilst a "full and complete" settlement may be made in the probate court in such a case, (which, of course, involves the necessity of a final decree for any balance that may be found against the deceased representative, whose administration is settled,) still, no mode is prescribed by the legislation above cited, for the enforcement of such a decree; and how it should

be enforced, seems to be a question not yet definitely settled.—*Jenkins v. Gray*, 16 Ala. 100; *Gray v. Jenkins*, 24 Ala. 516; *Howard's Distributees v. Howard's Adm'rs*, 26 Ala. 682; *Thomas v. Sterns*, 33 Ala. 137.

But, however this may be, we are satisfied that, when a case is situated, as to *parties*, like the present, the probate court can render no valid decree against the representative of the deceased representative, for any balance that may be found due on the decedent's administration. The party making the settlement being the representative of both estates, a decree can not be rendered *in his favor*, as the representative of one estate, *against himself*, as the representative of the other. The probate court is one of statutory powers and jurisdiction, and we may search in vain for any statute authorizing the rendition of such a decree as this.

The probate court, doubtless, seeing this difficulty in the present case, attempted to obviate it, by entering the decree in favor of Samuel W. Cockrell, as special administrator, for the use and benefit of the estate of Robert A. Hairston. It can not be successfully contended that this is a valid decree in favor of the estate named. The "*estate*," *eo nomine*, is no person in law, and neither is it in fact. It has been held by this court, that a decree in favor of "the legatees of Philip Joseph," is a nullity.—*Joseph's Adm'r v. Joseph*, 5 Ala. 280. So, a decree of the orphans' court, in favor of "the personal representatives or legal heirs entitled thereto (when ascertained) of Mildred Dupree, deceased," was held to be void for uncertainty.—*Turner, adm'r, v. Dupree's Adm'r*, 19 Ala. 198. And so of a decree of the court of probate, against an administrator, in favor of "the legal representative" of a distributtee, without naming such representative.—*Kyle v. Mays, use, &c.*, 22 Ala. 673. See, also, *Gilbreath v. Manning*, 24 Ala. 418; *Watts' Adm'r v. Watts' Distributees*, 37 Ala. 543. The decree, as rendered in the present case, is, we think, a nullity; for, as an administrator *ad litem*, appointed under the act of 1863, the position of Samuel W. Cockrell, as to rights, interests, and duties, was entirely analogous to that of a guardian *ad litem*, in similar cases; and from his position and interest

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in regard to the litigation, no valid decree could be rendered in his favor.

It results from what we have said, that the court of chancery alone has the power to effect such a settlement as was attempted in the present case; and the nature and condition of the respective interests involved of the two estates, as well also as their condition in regard to parties representative, present a case peculiarly fitted for equity jurisdiction.

[2.] As we have already remarked, the jurisdiction of the probate court, in the adjustment of the estates of deceased persons, is limited, depending entirely upon legislative grants in its favor.—*Leavens v. Butler*, 8 Porter, 380. Cases sometimes arise, in which trusts are to be established, or executed, and for the establishment or execution of which the probate court is powerless to act. In such cases, the jurisdiction of the court of chancery is exclusive; and such has long been the established doctrine of this court.—*Portis v. Creagh*, 4 Porter, 332; *Leavens v. Butler*, *supra*; *Harrison v. Harrison*, 9 Ala. 470; *Billingslea v. Harris*, 17 Ala. 214; *Gerald and Wife v. Bunkley*, 17 Ala. 170.

The case of *Weems, ex'r, v. Bryan and Wife*, (21 Ala. 302,) would seem, from the language employed in the opinion of the court, to subvert this salutary and long established rule, in so far as the settlement of the husband's trusteeship of the wife's statutory separate estate is concerned. But an examination of the facts of that case will show that the question of the execution or settlement of the trust was not legitimately presented. The true question was, whether it was competent to surcharge the inventory of the executor, as to specific assets alleged to be the property of the estate of the testatrix; and this may, in all cases, be done in the probate court, notwithstanding that court has not the power to establish or execute a strict trust. The want of jurisdiction in the court to execute a trust, can not oust it of jurisdiction of such a matter as this, plainly given as it is by the statute.—See remarks of Dargan, C. J., in *Gerald and Wife v. Bunkley*, 17 Ala. 177, 178. See, also, *Wilson v. Knight*, 18 Ala. 129. We hold, therefore, in obedience to a well-established principle,

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founded as it is in the soundest reason, that the probate court has not the jurisdiction to settle the husband's trusteeship proper of the wife's statutory separate estate; and this view is not in conflict with the previous decisions of this court, to the effect, that on the death of the husband, the legal as well as the equitable estate in the wife's separate property vests in her, and that she may maintain an action at law for the recovery of the *corpus* of the estate.

We might proceed to settle several other questions presented by the record, which will probably arise again, in the future litigation between the parties, before the proper forum; but, on the authority of previous decisions of this court, the record does not inform us that all the evidence on which they are based, is set out; and furthermore, the evidence as to some of the questions may not again be the same. We, therefore, decline to consider any of them, with the exception of one, which does not come within the reason named. That question is, the influence as authority of the case of *Weems, ex'r, v. Bryan and Wife*, 21 Ala. 302. This case is attacked in the argument of counsel, and the rule established by it, as to the right of the husband to "*emblems*" of the wife's statutory separate estate, is directly involved, and must again arise in the litigation; and we deem it proper to consider it. If its influence as authority is to cease, the sooner the fact is made known the better.

Sections one, two, and three, of the act of February 13, 1850, and sections 1982 and 1983 of the Code, are the same, in effect, in the following respects: They secure to the wife, as her separate estate, all property held by her previous to the marriage, and all property she may become entitled to, in any manner, after the marriage; they vest in the husband, as trustee of the wife, all the property thus belonging to the wife, give him the right to control and manage the same, and exempt him from liability to account with the wife, her heirs, or legal representatives, for the rents, income, or profits of the estate; but expressly declare, that such rents, income, and profits, *shall not be subject to the payment of the debts of the husband*.

Thus stood the law, the act of 1850 being then of force,

when the case of *Weems v. Bryan* was decided. In that case, our predecessors held as follows: "There can be no doubt, but that the husband became tenant for the life of the wife, (*per autre vie*,) of the rents and profits of the wife's estate. The right 'to have and possess, control and manage' her property, during the coverture, without liability to account for rents and profits, makes him so. Like every other tenant for life, he is entitled to emblements, that is, the crop growing or matured, and whether gathered or not gathered, at the termination of the life estate.—*Ram on Assets*, 188. Not being liable to account to any one for the crop that was grown in the year 1850, under this interpretation of the statute, it follows as a matter of course, that plaintiff in error was not bound to include in his inventory the crops of that year, or their proceeds. The law makes them his own."

Without entering upon the reasons which might readily be given, to show the want of analogy, and the palpable incongruity between an estate, either for a person's own life, or for the life of another, (*per autre vie*,) and the interest which a husband has in the statutory separate estate of his wife, we proceed to the consideration of some of the results legitimately springing from the establishment of the rule as stated; and to show that the rule, to the extent it goes, is in conflict with, and subversive of, both the letter and spirit of the statute under which the decision was made, as well as of the law as it now stands, securing to married women their separate estates.

The rents, income, and profits, of the wife's separate estate, under the statute, are, as we have seen, not subject to the payment of the debts of the husband. If, then, the crops raised on the plantation of the wife, during the year of the husband's death, and by the use of her provisions, stock, plantation utensils, and laborers, go to the administrator of the husband's estate, as "emblements," what is the administrator to do with the proceeds? Being assets of the husband's estate, in his possession to be administered, he must first pay, out of the assets in his hands, the debts of the estate, and then distribute the residue, if any, amongst the distributees. But, if the estate should be insolvent, (as

is the fact in the case before us,) the whole of the proceeds of the wife's crops, thus made, would, under the rule laid down in the case under review, be absorbed by the creditors of the husband, directly in the teeth of the prohibition of the statute; or else the anomaly, if not absurdity, would have to be perpetrated, of declaring that property of the estate, in the hands of the administrator to be administered, should not be made subject to the debts of the creditors of the estate, but be divided amongst the distributees.

On the death of the husband, the wife's separate estate is discharged of all trusts; and the legal, as well as the equitable title, vests in her.—*Andrews and Wife v. Huckabee's Adm'r*, 30 Ala. 143. Has the administrator of the husband the right to take the wife's provisions, stock, plantation utensils, &c., thus the wife's absolute property, and consume the provisions, and use the other property, in making and gathering the crop, in order to swell the estate of the husband? If so, on what just principle is she thus to be deprived of her property? The law recognizes no such solecism as a right in the wife to the estate, after the death of the husband, and a right in some one else to use it as he may please, and enjoy all the advantages of its use.

But it may be said, that the provisions, stock, &c., on hand at the death of the husband, are not "emblemments," and that the estate of the husband can be made to account to the wife for their use and consumption, in making and gathering the crops. If this be so, of what value is the liability to account, when the estate of the husband is insolvent? The provisions of the wife may be consumed, and her stock and other property be deteriorated in value, if not destroyed, in making and gathering the "emblemments;" the family be left destitute at the end of the year, and the wife then have turned over to her a barren plantation, denuded of the means of subsistence, and of almost every thing else necessary to carry on the plantation for another year; and all this by naught but judicial legislation.

The *support of the family* was the primary object intended to be secured by the statute, in authorizing the husband to receive the rents, income, and profits of the wife's estate,

without being liable to account therefor, and in placing such rents, income, and profits, beyond the reach of the husband's creditors. A construction which gives to the administrator of the husband, as against the wife, the rents, income, and profits of the estate, accruing subsequent to the husband's death, is violative of the policy, as well as of the plain meaning and intent of the statute.

In *Bennett v. Bennett*, (34 Ala. 53,) the court refrained from expressing an opinion as to the correctness of the decision in *Weems v. Bryan*, but announced an unwillingness to unsettle titles, "probably resting on its principles," by overruling it. The court further said, that they were "the more reconciled to this conclusion, because in the settlement of accounts between the wife and the estate of the husband, where each owned property, and they had worked their property in common, the most embarrassing difficulties would frequently be encountered in separating the one interest from the other" If the decision in *Weems v. Bryan* has become a "rule of property," to any extent, it is a rule in violation of an existing statute; and we know of no just principle, which requires it to be perpetuated; on the contrary, sound policy, and a just regard for the legislative will, unite in demanding its destruction. With due deference, we consider the last reason of the court, given in *Bennett v. Bennett*, for reconciliation to the case under review, quite unsatisfactory. The "embarrassing difficulties," which the court considered would frequently be encountered without *Weems v. Bryan*, are not unusual in transactions, growing out of trusts and partnerships, between other persons than husband and wife; and there is a ready forum provided for their solution and adjustment. Furthermore, the "embarrassing difficulties," created by *Weems v. Bryan*, are more embarrassing, and more numerous, than any which could exist without that case.

In the subsequent case of *Boaz v. Boaz*, (36 Ala. 334,) this court correctly stated one of the main objects of the legislature, in the passage of the act securing to married women their separate property. A. J. WALKER, Chief-Justice, in delivering the opinion of the court in that case, said: "It is a fair inference from these provisions, that the

husband is not vested with a title in his own right, for any space of time, to the wife's separate estate; that the law has permitted him to receive the income, with the purpose that he might, as the head of the family, have the means of maintaining that family, and has made it free from liability to debts, in order that his misfortunes or thriftlessness should not prevent the accomplishment of the purpose." It was further announced in that case, that the law "clearly makes the husband's right subordinate to the great purpose of providing a maintenance for the family." It is impossible to reconcile these and other utterances of the court in that case, with the decision in *Weems v. Bryan*. In principle, the case of *Boaz v. Boaz* overrules the case of *Weems v. Bryan*.—See *Patterson v. Flanagan*, 37 Ala. 513.

The same provisions of the statute creating separate estates in married women, should not be construed one way in one class of cases, and another way in a different class. Judicial harmony, and a proper estimate of the character of our law, require that the construction should be uniform in all cases.

The presumption is, we admit, that a judicial decision, "made upon solemn argument and mature deliberation," is correct. We concede further, that, "if judicial decisions were to be lightly disregarded, the great landmarks of property would be disturbed and unsettled"; and that "when a rule has been once deliberately adopted and declared, it ought not to be disturbed, except for very cogent reasons, and upon clear manifestation of error." But Chancellor Kent, from whom we have quoted above, says further: "I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than leave the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."—1 Kent, 476.

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Under our system of government, there is but one department which can make laws. When a statute is enacted, it is the province of the judiciary to expound and enforce, not to repeal or annul it. The case of *Weems v. Bryan* can not be sustained, in our opinion, without partially annulling the statute which gave it birth; and the question, therefore, is, whether or not the doctrine of *stare decisis* shall override a statute of the State. We have the profoundest respect for the legal learning and ability of the members of the court who pronounced that decision; and would not, but for reasons which we consider imperative, disturb it. It should be remembered, however, that at the time the decision was made, the statute it construed was a new one, and for the first time before the court; that it created a new system, which subverted common-law rules that had existed for ages; that but little knowledge had then been derived, of the practical workings of this system; and that the case was argued on but one side, and that the side on which the opinion was delivered. Under these circumstances, it is, perhaps, not surprising, that the court should have decided the case as it did.

For the reasons we have given, as well also as under the influence of the cases of *Boaz v. Boaz* and *Patterson v. Flanagan*, *supra*, we feel constrained expressly to overrule the case of *Weems, ex'r, v. Bryan and Wife*, (the same having already been overruled in effect, as before stated,) as to the rule established by it herein discussed; and also the case of *Bennett v. Bennett*, (*supra*,) the latter case resting entirely upon the authority of the former.

[3.] The final decree rendered in the cause is *void upon its face*, and no execution could have been issued thereon and it might have been vacated by the probate court, on motion. Consequently, no appeal will lie from the decree, and the appeal of Charles Hays must be dismissed at his costs. For the same reason, the appeal of S. W. Cockrell must be dismissed at his costs. The proceeding in the court below must be dismissed, at the cost of Charles Hays. Let a judgment in each case be entered accordingly. As to the correctness of the order dismissing the appeals, see the following authorities: *Joseph's Adm'r v. Joseph*, 5 Ala.

280; *Patterson v. The Officers of Court*, 11 Ala. 740; also, 30 Ala. 78; 32 Ala. 497; 25 Ala. 722; and *Curtis v. Denson*, at the January term, 1867.

A. J. WALKER, C. J.—It is perhaps true, that in the imperfect and incomplete condition in which the act of 27th November, 1863, leaves the definition of the authority and duties of a special administrator, that a resort to the chancery court is necessary, when the same person is the representative of two adversely litigant estates. On that question, I should have been willing to have yielded my prepossessions to the contrary, and consented to the conclusion of my brethren, that the court below had no jurisdiction to make the settlement. But the majority have not stopped with deciding that there was a want of jurisdiction. They have decided other questions, as to which I consider it my duty to express my opinion.

1. No question of the settlement of the husband's trust estate, if our former decisions stand, is involved in this case. The trust terminated with the husband's death. The husband, during the coverture, was entitled to the rents, income, and profits. No question as to these accruing during the trust arises in the case. The only question is, what, after the termination of the trust, belonged to the wife, and what to the husband's estate. This is a legal question, determinable in the law forum. The authorities are plain. *Dent v. Slough*, in manuscript; *Kirksey v. Stewart & Lucius*, 38 Ala. 692; *Patterson v. Flanagan*, 37 Ala. 513; *Canty v. Sanderford*, 37 Ala. 91; *Murphree v. Singleton*, 37 Ala. 412; *Bennett v. Bennett*, 36 Ala. 571; *Sessions v. Sessions*, 33 Ala. 522. The decision in *Andrews v. Huckabee*, (30 Ala. 143,) so far as it would have tolerated concurrence of jurisdiction in the chancery court, has been overruled in the case of *Bennett v. Bennett*, *supra*. The majority of the court do not intend to overrule those decisions. Aside from the difficulty produced by the antagonistic positions of the two representative capacities of Charles Hays, there is not the slightest necessity for a resort to the chancery court, unless that necessity is produced by the abolition of the rule established in *Weems v. Bryan*, (21 Ala. 302.) If we abolish

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that rule, asserting the title of the husband, or his administrator, to the crop grown on the land of the wife's separate estate during the year in which the coverture and trust are terminated by death, as emblements, questions will arise, which a chancery court alone can settle. Where the husband's skill, industry, property, or money, has contributed to the production and gathering of a crop on the wife's land, a division of such crop, by which the husband or his representative may be compensated for such contribution, will become necessary, and such division must be had in chancery.

In my opinion, the case of *Weems v. Bryan* ought not to be overruled. The difficulty in the execution of the married-woman's law, as to the manner in which the rights of the parties in the crop should be adjusted when the trust was terminated after the planting of the crop, was encountered soon after its adoption. That difficulty, productive of great litigation, was solved by the decision in *Weems v. Bryan*, fifteen years ago. No matter whether that rule was consistent with all the provisions of the married-woman's law or not, it met and obviated the difficulty; it defined the rights of the parties with unmistakable clearness, and gave them a form of such simplicity, as to be capable of enforcement, in almost every case, in a court of law. Sweeping away that decision, the court now compels the parties to ascertain and obtain their rights in reference to such crop through the machinery of a chancery court, and leaves them without a rule to guide them. Fixed principles will scarcely be found to guide the court in ascertaining the share of the wife, or her representative, and of the husband, or his representative. Plainness and simplicity give way to obscurity and doubt, and difficult litigation takes the place of easy adjustment. This is my first objection to the overruling of *Weems v. Bryan*.

My next objection is, that a judicious application of the doctrine of "*stare decisis, et non quia movere*," requires that it should be sustained. It has stood as the law of the State for fifteen years. Its operation reached and affected large numbers of persons, in every part of the State. Re-

sults pernicious to the people, or injurious to recognized and accepted rights, would have become the subject of general observation and complaint, and would have provoked corrective legislation. That there has been no attempt, during this long period, to correct such evils, negatives their existence, and demonstrates a legislative acquiescence in the rule. This acquiescence is rendered more obvious and striking by the fact, that the objection to it is its conflict with the enactment of the legislature.

Six or seven years after this decision, it was assailed on the hearing of the case of *Bennett v. Bennett* (34 Ala. 53). This court then met and repelled this assault, in the following language: "The case of *Weems v. Bryan and Wife*, *supra*, was decided more than six years ago. It lays down a rule for the descent and disposition of property, which, it is reasonable to suppose, has been frequently acted upon. It has thus, doubtless, become a rule of property; and while we forbear to express an opinion as to the correctness of that decision, if the question were *res integra*, we are unwilling to unsettle titles, which probably rest on its principles. We are the more reconciled to this conclusion, because, in the settlement of the accounts between the wife and the estate of the husband, where each owned property, and they had worked their property in common, the most embarrassing difficulties would be encountered in separating the one interest from the other."

In the still later case of *Patterson v. Flanagan*, (37 Ala. 513,) the court, after quoting from *Weems v. Bryan*, and noticing several other decisions, says: "It is not our intention to weaken or overturn any decision heretofore made, bearing on section 1983 of the Code. Those decisions have, doubtless, been acted on, and have become rules of property. But we are not inclined to enlarge the husband's interest in the wife's separate estate."

These quotations show, that this court has decided that the doctrine of *Weems v. Bryan* is a law of property, and has twice distinctly announced that it would not overrule that case, but suffer it to stand as an exposition of the law, according to which the people might act, and shape their transactions without apprehension. Men must be presumed

to have acted in reference to it, and in reference to the assurance of its stability; property has been received, and delivered, and transferred, and liabilities have been incurred in many cases, and by many persons, including executors and administrators, and their sureties. In overturning the doctrine of *Weems v. Bryan*, the court opens the door for strife and litigation, the extent of which we can not estimate, and contributes to produce an apprehension, that no solemnity or repetition of adjudication or judicial assurance merits confidence, or guaranties permanency and stability of principle.

Recognized elements of a case demanding the support of a precedent by the doctrine of *stare decisis*, are, the length of time for which it has stood, the number of times in which it has been declared, legislative acquiescence, its operation as a rule acted upon in the business of the country, and especially, and above all, its constituting a rule of property or becoming a muniment of title to it.—*Nolen v. Palmer*, 24 Ala. 391; *Strickland v. Nance*, 19 Ala. 233; *Hibler v. McCurtney*, 31 Ala. 506; *Rawles v. Kennedy*, 23 Ala. 240; *Douglass v. Beasley*, in manuscript; other cases collected in Shepherd's Digest, 574, § 177; Ram on Legal Judgment, m. p. 112, 9 Law Library, 66; Sharswood's Legal Ethics, Introduction, p. XXXLIII. A reference to the authorities cited above will, in my judgment, show that the concurrence of every element of a case for the operation of the doctrine of *stare decisis* is presented, and that the overruling of *Weems v. Bryan* is a departure from established principle.

The court, however, not only overrules the decision in *Weems v. Bryan*, but, in overruling that, it also overrules the decisions in *Bennett v. Bennett* and *Patterson v. Flanagan*. It overrules the two latter, not only when regarded as asserting the same principle with the former, but it overrules the decision of those two cases, that *Weems v. Bryan* was protected by the doctrine of *stare decisis*. The very point of controversy, whether *Weems v. Bryan* could be questioned as an authority, was expressly adjudged in *Bennett v. Bennett*, and passed upon, in a *dictum*, in *Patterson v. Flanagan*.

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The ruling on that point, in those two cases, is also subverted along with the doctrine in *Weems v. Bryan*.

While I regard *Weems v. Bryan* as asserting a convenient rule in reference to one branch of the married-woman's law, I do not defend it on principle. I think it inconsistent with the legislative intention. The error of a precedent is, however, not necessarily a reason for withholding from it the shield of *stare decisis*. That doctrine was made to support decisions deemed wrong. Correct decisions, or those deemed correct, can stand without it. Fealty to that conservative doctrine is evinced only in upholding precedents which are considered wrong. It exacts, in appropriate cases, a surrender of judgment to predecessors, and to the necessity of repose, of stability in the system of laws, and of public confidence in judicial precedents.

What I have written has not been for the purpose of vindicating *Weems v. Bryan*, nor for the purpose of weakening the influence of the decision of the court in this case, or preventing its acceptance and adoption as the law, so far as it asserts a doctrine in conflict with that announced in the case overruled. The decision of the court in this case being made, it will probably increase the confusion to subject it to question, and it will probably be better that it should be regarded as permanent.

I admit that the view of the statute which guided this court in *Boaz v. Boaz*, and *Patterson v. Flanagan*, is not that which prevailed in the decision of *Weems v. Bryan*. But the case last named could have been upheld, as a rule of property, without colliding with the two former cases. The rule of *stare decisis* does not require that a wrong decision should govern in every case, in which the principle underlying it might arise. Consistently with the maxim, the operation of such a decision may be confined within the area of those cases in which it has been acted upon as a precedent, and governs the titles to property. Such an operation this court indicated its intention to allow the precedent in question, when it decided *Bennett v. Bennett* and *Patterson v. Flanagan*. My purpose is to contribute what I can to sustain the doctrine of *stare decisis*, and to prevent the decision of the court in this case from becom-

ing a precedent for the easy overthrow of that doctrine hereafter.

I think the order of the court dismissing the appeals is wrong, even if the opinion of the court were correct.

EASTERN BANK OF ALABAMA vs. TAYLOR.

[MOTION TO ENTER SATISFACTION OF JUDGMENT.]

1. *Purchase by agent from himself.*—An agent, having authority to sell, may purchase from himself; and such purchase will be valid against all the world, except the principal, who may set it aside within a reasonable time.
2. *Payment and transfer of judgment.*—If a bank agent, having authority to collect or transfer its judgments, makes a written assignment of one of its judgments to himself, and remits to his principal the money due on it, this does not, of itself, amount to a payment or satisfaction of the judgment, as in favor of the defendant; but it is a question for the jury to decide, whether the transaction was intended as a payment and satisfaction, or as a transfer. If a transfer, and not a payment of the judgment, was really intended by the agent, no loose declarations on his part, or on the part of his principal, would convert it into a payment; and if a payment was really intended by him at the time, the character of the transaction could not be changed, as against the defendant, by any subsequent conduct on the part of the agent or his principal.
3. *Conclusiveness of declarations.*—If an agent, having authority to collect or transfer a judgment belonging to his principal, makes a written assignment of it to himself, his declaration to his principal, made at the time of remitting the money, to the effect that the judgment was paid, does not estop him, on a subsequent motion by the defendant to enter satisfaction of the judgment, from showing that the transaction was really intended by him at the time, not as a payment, but as a transfer of the judgment.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

THE appellant in this case recovered a judgment in said city court, against the appellee, on the 3d March, 1863, for

\$4,677.84, principal, and \$497.96, interest. An execution having been issued on this judgment, on the 3d March, 1866, and levied on the defendant's property, he made a motion in said city court, at the return term of the execution, to quash the execution, and enter satisfaction of the judgment, on the ground that the plaintiff had accepted and received satisfaction thereof. The fact of payment or satisfaction being denied by the plaintiff, an issue was formed between the parties, which was submitted to a jury and tried at the June term, 1866, of said city court. On the trial of said issue, the plaintiff in the judgment reserved several exceptions to the rulings of the court as to the admissibility of evidence, and also in the matter of instructions to the jury; all of which rulings are now assigned as error. The bill of exceptions purports to set out all the evidence introduced on the trial; but a summary of the material facts, as disclosed by the evidence, will enable the reader to understand the legal questions here decided.

Albert Williams was the agent of the bank in Montgomery, and had authority, as such agent, to collect or transfer its judgments. In October, 1863, said Williams, being instructed by the bank to press the collection of its claims, remitted to the bank, in Confederate treasury-notes, the amount due on the judgment against Taylor, and made an endorsement on the execution docket, transferring the judgment to himself. This endorsement was signed by said Williams as agent, purported to transfer the judgment to himself, for valuable consideration, without recourse on the bank, and was dated the 10th October, 1863; but the time when it was made was not proved. Williams was offered as a witness on the part of the plaintiff, but was excluded by the court, on the ground of incompetency. The deposition of John McNab, the president of the bank, was taken on interrogatories and cross-interrogatories, and was read in evidence on the trial. His answers were in the following words: "Witness is the president of the Eastern Bank of Alabama, and has been since its establishment in 1858." "The said bank was the holder of the bill of exchange specified in the second interrogatory, and the judgment against William Taylor was founded on said bill. He believes that

said bill was protested, but can not state positively, and does not recollect the date of the protest. Albert Williams was the authorized agent of the bank in Montgomery to collect said claim, and paid to the bank the amount of said judgment. Witness has not, at present, access to any letter or report of said agent to said bank, concerning the payment of said claim." "Said Williams, as the agent of the bank, reported the claim to the bank as paid, and it was entered on the books of the bank as paid by him. Said agent had authority from the bank to transfer any of its judgments under his control as agent, conditioned that no liability should attach to the bank by said transfers. The authority to make such transfers was not restricted to any particular judgments." [Answers to cross-interrogatories.] "As above stated, the bank received the amount of said judgment. Witness did not know that the payment was made to the bank by said Williams as an advance, and upon a transfer of said judgment to himself; but said agent was authorized to transfer any judgment, as he saw proper, so that the bank should incur no liability by such transfer. Witness has since been informed, by said agent, of such advance and transfer, and that the bank ratified the transfer. Said Williams was the agent to superintend the collection of said judgment." "The payment was made to the bank, in full of said judgment, in the fall of 1863, as well as witness now remembers, by said agent. His impression is, that the bank was urging the collection of all claims in the hands of said agent at that time. He did not know any person but said agent in the payment of said judgment. The bank has ratified the transfer of said judgment by said agent to himself." To prove the ratification by the bank of the transfer of the judgment by Williams to himself, the plaintiff offered in evidence an instrument of writing, under the seal of the bank, which, after reciting that said Williams had authority "to control said judgment, at his discretion, for the interest of said bank," that he was requested by the bank to collect its claims in his hands, and that he purchased and paid for the said judgment against Taylor, and transferred the same to himself, proceeded as follows: "Now, in consideration of the premises,

be it resolved by the president and directors of the Eastern Bank of Alabama, that the transfer of said bill of exchange, made by said Williams to himself, is ratified and confirmed, and all the interest of said bank in said bill of exchange, and in the judgment or judgments based thereon, is hereby recognized to have been transferred by virtue of the assignment made by him as aforesaid." This instrument, which was dated the 21st June, 1866, was admitted in evidence by the court, against the objection of the defendant in execution, "though he admitted its execution." The plaintiff in the judgment reserved several exceptions to the rulings of the court on questions of evidence, which require no particular notice.

The court charged the jury as follows: "The question for decision is, whether the facts in evidence constitute a payment of the judgment by Williams, or a purchase of it from the bank. If a payment, the defendant in execution is entitled to have satisfaction of the judgment entered up; if a purchase, then the judgment still stands, and execution may issue on it. If the jury believe, from the evidence, that Williams, being the agent of the bank to *convert* and transfer its judgments, reported the judgment against Taylor to the bank, in 1863, as paid, and, at the same time, sent the amount of the judgment, and that the bank entered it on its books as paid by said Williams, and accepted it in full payment and satisfaction of the judgment—these things, taken together, operate as a payment and discharge of the judgment, upon the condition, that the defendant in execution availed himself of it; and although the said Williams intended it as an advance, and transferred the judgment to himself, and although the bank ratified the transfer after this motion was made, such subsequent ratification by the bank could not convert the payment into a purchase, nor divest the defendant in execution of his right to avail himself of it." The court charged the jury, also, at the request of the defendant in execution, "that, if they believed all the evidence, they should find in favor of the motion." The plaintiff in execution excepted to each of these charges, and requested the following charges in writing:

"1. That it is not a payment and satisfaction of a judgment, where a third person pays the amount of a judgment against the defendant, with the intention of holding it for his own use, although he takes no transfer to himself.

"2. That if Williams, as an individual, advanced to the bank the amount of the judgment against Taylor, with no intention that said advance should operate as a satisfaction of the judgment, and, as the agent of the bank, made a transfer of said judgment to himself; and if the bank, with a full knowledge of these facts, ratified the action of said Williams, then the advance of money by said Williams does not operate as a satisfaction of said judgment.

"3. That the transfer made by Williams to himself, was a transfer which the bank could ratify; and if it did, the ratification relates back, and makes the transfer valid from the time it was made.

"4. That although the bank may have believed the advance made by Williams was a payment, and so treated it, under a misapprehension of the true facts, it was competent for the bank, at any time, to correct the entry, and to treat the money as an advance instead of a payment; and that the misapprehension of the bank, treating such advance as a payment, does not entitle the defendant in the judgment to a satisfaction of the judgment.

"The court refused each of these charges as asked, but gave them with the qualification, that each of said charges must be taken in connection with the general charge already given; to which qualification, as well as to the refusal of the several charges as asked, the plaintiff in the judgment excepted. The said plaintiff requested the court to charge the jury, also, that unless Williams paid the judgment in the name of the debtor, such payment will not amount to a satisfaction of the judgment. The court refused this charge also, and the plaintiff excepted to its refusal."

The charges given, the refusal of the several charges asked, and the rulings of the court on questions of evidence to which exceptions were reserved by the plaintiff, are now assigned as error.

CHILTON & THORINGTON, and MARTIN & SAYRE, for the appellant.—1. The bank, and it alone, could affirm or disaf-

firm the act of its agent. It chose to ratify his act, and thus validated the transfer *ab initio*.—Story on Agency, §§ 210, 211, 214, 239, 240, 242, 244, 248, 250; 18 Viner's Abr. 156-7; *Stone v. Hayes*, 3 Denio, 580.

2. That the ratification refers back to the time when the transfer was made, see the authorities above cited; also, Co. Litt. 207 *a*; *Foster v. Bates*, 12 Mees. & W. 226; *Heath v. Chilton*, *ib.* 631; *Hall v. Pickersville*, 1 Brod. & B. 283; *Copeland v. Merchants' Insurance Co.*, 6 Pick. 204; *Gaines v. Acre*, Minor, 141; *Reynolds v. Dothard*, 11 Ala. 534; *Dennis v. Lightfoot*, 16 Ala. 33; *Creagh & Forward v. Savage*, 9 Ala. 961; 2 Bouvier's Institutes, 27; Broom's Legal Maxims, 676; 1 American Leading Cases, 572.

3. To constitute a payment, it must be made for the purpose of extinguishing a debt, and be received for that purpose.—*Kingston Bank v. Gay*, 19 Barbour, 459; *Tankersley v. Graham*, 8 Ala. 247; *Leach v. Williams*, 8 Ala. 760; 1 Bouvier's Institutes, 314.

4. If the bank received the money from Williams under a misapprehension as to the facts, supposing it to be a payment when in truth it was an advance in the purchase of the judgment, the mistake may surely be corrected between them. It is a matter with which Taylor has no concern, and he is not injured by the correction.—7 Johns. 311.

RICE, SEMPLE & GOLDTHWAITE, *contra*.—1. Satisfaction by a stranger is good.—*Miller v. McLane*, 10 Ala. 856; *Sanders v. Br. Bank at Decatur*, 13 Ala. 353; *Brewer v. Br. Bank at Montgomery*, 24 Ala. 439.

2. An agent, having authority to collect a judgment, and to transfer it, "conditioned that no liability should attach to" his principal by such transfer, can not create in himself a right to the judgment, by transferring it to himself, reporting it to the bank as paid, and paying the amount due on it to the bank; which payment the bank accepts as a satisfaction of the judgment, and enters on its books as satisfaction. Public policy forbids that a man should be at the same time both buyer and seller, and renders void every sale by an agent of a private corporation to himself. *McGehee v. Lindsay*, 6 Ala. 16.

3. The transaction being void, because in contravention of public policy, is incapable of confirmation.—*Pettit v. Pettit*, 32 Ala. 288; *Chambers v. Kemett*, 14 Howard.

4. If the transaction were capable of confirmation as between the principal and agent, the ratification comes too late, so far as the defendant is concerned; he having signified his intention to accept the payment as made for his benefit, and made his motion for an entry of satisfaction, before the alleged ratification. The law never permits a subsequent ratification, as between private individuals, to change the legal nature of the act, or to work an injury to third persons.—*Brown v. Deenan*, 2 Exchequer R. 167, 188-89; 1 American Leading Cases, H. & W.'s Notes, (3d ed.) 572; Story on Agency, §§ 240, 241, 246.

5. So far as the rights of the defendant are concerned, Williams is estopped from denying the statements which he made to the bank, and on which the defendant has acted by making his motion in this case.—*McCravey v. Remson*, 19 Ala. 430; *Polk v. Harrison*, 16 Ala. 167. Nor can Williams be heard to say, that the bank, in accepting the payment made by him, and in entering satisfaction of the judgment on its books, acted under a mistake, or a misapprehension of the facts. All the facts were within the knowledge of Williams himself; and if he failed to communicate them to his principal, he suffers by his own fault, and can not complain of it.—Story on Agency, §§ 140, 451; *United States Bank v. Davis*, 2 Hill (N. Y.) 451; *Willis v. Bank of England*, 4 Ad. & El. 21.

A. J. WALKER, C. J.—In the court below, the plaintiff's judgment was adjudged to be satisfied. The bill of exceptions sets forth the entire evidence in the case, together with the charges, upon which the verdict, that the judgment was satisfied, is predicated. One Williams was, in 1863, the agent of the plaintiff, having authority to collect the judgment, or to transfer it, provided the plaintiff should incur no liability by such transfer. Williams, the agent, transmitted the amount due upon the judgment, to the plaintiff, and endorsed upon the execution docket a written transfer, without recourse, to himself; which was signed

by himself, as the agent of the plaintiff. The transfer purports to be upon a valuable consideration, the receipt of which is acknowledged by Williams, as the plaintiff's agent.

[1.] It is contended in argument, that a sale by an agent, to himself, although he has authority to sell, is absolutely void. Such is not the law. A purchase by an agent, or trustee, at his own sale, is valid, except as to the principal, or *cestui que trust*, and is not absolutely void, but void at the election of such principal or *cestui que trust*, seasonably expressed; and is capable of confirmation, so that it can not be avoided. The points involved in this proposition have been so frequently ruled, and so thoroughly elucidated, that it is only necessary for us to refer to the different decisions on the subject, for they preclude any further investigation of it.—*Charles v. Dubose*, 29 Ala. 367; *Payne v. Turner*, 36 Ala. 623; *Andrews v. Hobson*, 23 Ala. 219, 235–236; *Bott v. McCoy & Johnson*, 20 Ala. 578; *Gunn v. Brantley*, 21 Ala. 633; *Creagh & Forward v. Savage*, 9 Ala. 959; *McLane v. Spence*, 6 Ala. 894.

A remark made in *Walker v. Palmer*, (24 Ala. 358,) might be regarded as opposing the proposition above laid down, if considered without reference to the point involved; but, when the question of the case is observed, the decision harmonizes with our proposition. Although some of our own decisions, above cited, restrict the right of avoiding the sale to the principal, or trustee, we fortify our proposition in that regard by reference to the following cases: *Davone v. Fanning*, 2 Johns. Ch. R. 268; *Hawley v. Cramer*, 4 Cowen, 744; *Jackson v. Walsh*, 4 Johns. 415; *Jackson v. Van Dalisen*, 5 Johns. 47. We have found no case, English or American, which is opposed to our proposition. In New Jersey it has been held, that the *cestui que trust* may avoid a sale by a trustee to himself, by an ejectment; and therein is a difference from the other decisions; but the question as to the rights of the respective parties is adjudged in that State conformably to our proposition.—*Scott v. Gamble and Wife*, 1 Stockton, 218. See an able review of the authorities on the subject, in the notes to *Fox v. Mackreth*, 1 White & Tudor's Lead. Cas. in Eq., m, pp. 92, 217.

The sale of the judgment by the plaintiff's agent, to himself, was valid, in the absence of the dissent of the principal. It did not need the ratification of the principal to give it a standing, until objected to, but a ratification would retroact, and place it beyond assault, even by the principal, from the date of the sale.—See the authorities *supra*; also, 1 White and Tudor's Leading Cases, m. pp. 140, 141. The doctrine, that an illegal or void contract is incapable of ratification, has no application to this case; for the transaction is neither illegal, in the sense in which the word is used in the rule upon that subject, nor is it void. The transaction held to be void in the case of *McGehee v. Lindsay*, (6 Ala. 16,) was not a purchase by a trustee, or agent, at his own sale; and while the court, *arguendo*, mentions with not very guarded phraseology the doctrine as to purchases by trustees at their own sales, it is obvious that the decision was not put upon those remarks, and that the case has no analogy to this.

[2.] The question of this case is, whether Williams bought the judgment, or whether he paid it off. This question is not to be decided upon any inconsiderate and loose use of the word *payment* in reference to the transaction. If the transfer, written on the execution docket, correctly represents the transaction, then the judgment was sold to Williams, and not paid off by him. In this case, he stands as if he had a right to buy from himself, as the agent of the plaintiff in the judgment, and as such agent to transfer it to himself; and if he did, in fact, purchase the judgment, and transfer it to himself, no other person than the plaintiff could object. In the absence of objection by the plaintiff, it stands good, and no entry upon the books of the plaintiff, that the judgment was paid, upon representation of the defendant that it was paid, would convert the sale into a payment. Neither the representation of Williams that the judgment was paid, nor the belief of the plaintiff that such payment was made, would constitute a payment. It would be evidence showing that a payment was made; but it would not be conclusive evidence, and might be rebutted.

[3.] The declarations of a party are not conclusive upon

him, unless they amount to an estoppel. The evidence does not show that Williams wrote to the plaintiff a proposition to discharge the judgment with the money which he transmitted, and that the proposition was accepted. It does not show that the communication of Williams to the plaintiff, and the action thereupon by the bank, had the form or substance of a contract for the discharge of the judgment. The witness McNab proves nothing more than that Williams represented, as a fact, that the judgment was paid. If this representation was incorrect, we think the plaintiff is not estopped from showing the truth. Because a party may argue an ability to maintain a suit from a declaration of his adversary, and ventures to sue upon the strength of such declaration, an estoppel does not result from proving the truth. We know of no case, in which the doctrine of estoppel has ever been carried to such an extent. An estoppel does not result from a statement to a third person, made without any intent to influence the other party, if there is no breach of faith in denying the representation.—*Welland Canal Co. v. Hathaway*, 8 Wend. 483; *Tufts v. Hayes*, 5 N. H. 453; *Kingsley v. Vernon*, 4 Sand. 361.

If Williams in fact paid the amount of the judgment to the plaintiff, as a payment and discharge thereof, it would be discharged; and a false entry upon the execution docket, of a transfer to him, would not change the case. Whether this was the case or not, was a question for the jury.

Under a recent act of the legislature, Williams will be a competent witness, and the question of his competency on the previous trial is unimportant.

Reversed and remanded.

CHAPMAN, LYON & NOYES *vs.* COWLES.

[MOTION TO SET ASIDE ENTRY OF SATISFACTION OF JUDGMENT.]

1. *Payment of judgment to sheriff.*—A sheriff has no authority to receive the money due on a judgment, except when he has an execution in his hands; and his receipt of the money without such authority neither discharges the judgment, nor imposes any liability on his sureties; yet, if he pays over the money to the plaintiff's attorneys of record, and it is received by them in satisfaction of the judgment, the debt is thereby discharged, if the payment was made in lawful money.
2. *Payment to attorney, of depreciated paper currency.*—An attorney-at-law has no authority to receive depreciated paper currency, in payment of a judgment; and if he does so receive it, his client may either proceed against him individually, thereby ratifying the payment, or may proceed against the debtor.

APPEAL from the City Court of Montgomery.
Tried before the Hon. THOS. M. ARRINGTON.

THE appellants in this case recovered a judgment against the appellee, on the 7th March, 1861, in the county court of Montgomery, (whose records were afterwards transferred to said city court,) for six hundred and eighty-six 85-100 dollars. An execution was issued on this judgment on the 25th March, 1861, which was placed in the hands of W. G. Waller, who was then the sheriff of said county; and on which the following endorsements were made by J. Y. Brame, who was the successor of said Waller as sheriff: "Plaintiffs being alien enemies, principal not collected, costs paid by the defendant, August 29, 1861"; "This execution is satisfied, March 3, 1863." At the June term, 1866, of said city court, the plaintiffs moved the court to set aside this return or entry of satisfaction, and to re-issue execution on their judgment. On the hearing of this motion, as the bill of exceptions states, the plaintiffs introduced said Brame as a witness, who read from his docket the entries relating to the execution, as above stated, and testified,

"that he received from the defendant, in satisfaction of said execution debt, Confederate States treasury-notes, which were at that time the common currency; that he had received no instructions from plaintiffs to accept said notes in satisfaction of said execution; and that he paid over said treasury-notes to Messrs. Martin, Baldwin & Sayre, (who were the attorneys of record of the plaintiffs, and who had obtained said judgment,) and took from them their receipt on his docket"; which receipt he read, and which purported to be "in full of plaintiffs' demand." The plaintiffs then introduced P. T. Sayre as a witness, who testified, "that he was a member of the firm known as Martin, Baldwin & Sayre; that said firm obtained the judgment in this case; that he signed the receipt on the sheriff's books; that the notes received by him were Confederate States treasury-notes; that neither he nor his firm had any communication with the plaintiffs since the commencement of the rebellion, until within the last three months, when they received a letter from the plaintiffs, stating that they (plaintiffs) were informed that the debt or judgment was paid, and if so, that they could retain their commissions, and remit the money; that they stated, in reply to this letter, that the debt was collected in Confederate treasury-notes, which were subject to their order; that plaintiffs had not since communicated with them; that the only instructions received by them from plaintiffs, were the usual instructions given to attorneys, 'to collect the debt, and remit proceeds, less the usual commissions'; that no directions or instructions were at any time received to receive in payment of said debt the currency or treasury-notes of the Confederate States; and that since the payment was made for which said receipt was given, plaintiffs had not ratified, or in any way consented to the same. This being all the evidence in the case, it was submitted to the court for decision; and the court overruled the motion, after due deliberation;" to which the plaintiffs excepted, and which they now assign as error.

J. Q. SMITH, with whom was JNO. A. ELMORE, for the appellants.—1. The sheriff had no authority, after the return term of the execution, to receive payment of the judgment.

Bobo v. Thompson, 3 Stew. & P. 385; *Barton v. Lockhart*, 2 Stew. & P. 109; *Holt v. Robinson*, 21 Ala. 106.

2. Even if he had a valid execution in his hands, he was not authorized to receive Confederate treasury-notes, or other illegal currency, in satisfaction of it, although that currency may have been at the time the common circulating medium of the country.

3. The subsequent payment of the money to Martin, Baldwin & Sayre, and their acceptance of it in discharge of the debt, can not affect the plaintiffs' rights. The state of war then existing, and the positive statutory enactments of the two contending governments, prohibited all commercial intercourse between citizens of the two sections, and terminated the relation of attorney and client between plaintiff and said attorneys. If that relation still continued, said attorneys had no authority, general or special, to receive illegal or depreciated currency; and although their receipt of such currency might, at the plaintiffs' option, render them liable for the debt, it could not affect the plaintiffs' right to proceed against the original debtor.

WATTS & TROY, *contra*.—The sheriff had a right to receive the common currency of the country, though depreciated, in payment of the execution in his hands.—*Huyes v. Wheat & Fennell*, 9 Ala. 239, and authorities there cited. Although the return term of the execution had passed, the subsequent payment of the money to the plaintiffs' attorneys of record, and their acceptance of it in satisfaction of the execution, discharged the debt as against the defendant.—*Dubberly v. Black's Adm'r*, 38 Ala. 193.

BYRD, J.—The appellants recovered a judgment against the appellee, in 1861. On the 25th of March of the same year, an execution issued on the judgment, and was placed in the hands of the sheriff, who made a return, dated August 29th, 1861, that, "plaintiff being an alien enemy, principal not collected, costs paid by defendant"; and on the 3d March, 1863, the sheriff endorsed on the execution, "This execution is satisfied," and signed his name thereto.

It does not appear that any other execution was ever issued on the judgment. On the 16th March, 1863, the sheriff paid the currency collected on the judgment to Messrs. Martin, Baldwin & Sayre, the attorneys of record of appellants, and took a receipt from them, "in full of plaintiffs' demand." It is apparent from the record, that the sheriff had no other execution in his hands than the one issued in March, 1861. He therefore had no authority to receive the money in 1863, so far as the record shows; and his endorsement on the execution, issued in 1861, of satisfaction, could not, and does not, bind his sureties on his official bond. *Bobo et al. v. Thompson et al.*, 3 Stew. & P. 385; *Barton v. Lockhart*, 2 Stew. & P. 109; 13 Ala. 526.

But the collection of a judgment by a sheriff, who has no authority to collect, and a subsequent payment of the money to the attorneys of the plaintiff of record, and the receipt thereof by them, in satisfaction of the demand, would, in law, be a discharge or satisfaction of the judgment.—*Dubberly v. Black's Adm'r*, 38 Ala. 193. But, to make a payment valid and a satisfaction of the judgment, in such a case, the money paid to the attorneys must be *lawful money*, or such as the law recognizes as a satisfaction.

[2.] The question in this case is, whether a creditor is precluded from proceeding against his debtor for payment of a debt or judgment, after the debtor has paid the attorney of the creditor depreciated paper money which is current, in satisfaction of the debt or judgment. We propose to notice some of the decisions bearing on this question, and the general authority of an attorney, and to deduce some principles therefrom which will be decisive of this case.

The case of *Jones et al. v. Ransom*, (3 Ind. 327,) was a proceeding to revive a judgment; the defendants relied on a compromise made with the attorneys of the plaintiff, and a ratification thereof by him, as a defense to the proceeding. The court held, that "the plaintiff was not bound by the compromise at the time it was made; the attorneys at-law having no authority to make it." The case was reversed, on the question of a ratification by the plaintiff of the compromise. The case of *Abbe et al. v. Roads*, (6 Mc-

Lean, 107,) is, in principle, the same as the case of *Jones v. Ransom*, *supra*.

The case of *Jewett et al. v. Wardleigh*, (32 Maine, 110,) holds, that "an attorney-at-law has no authority, *in virtue of his general employment*, to discharge an execution in favor of his client, unless upon payment of its whole amount." To the same effect, see the case of *Jenney v. Deslondrier*, 20 Maine, 183. An attorney of record in a judgment has no authority to accept a deed of trust for his client.—*Doub v. Barnes*, 4 Gill's R. 1.

In the case of *H. & G. Vail v. Conant*, (15 Vermont, 314,) it is held, that the power of an attorney is confined to the prosecution of a suit, and the incidents properly connected therewith, and does not extend to the compromising and discharging of the client's cause of action, without receiving his full claim.

The case of *Lewis, adm'x, v. Gamage*, (1 Pick. 347,) was an action against the original debtor, by a creditor, whose attorney received one hundred dollars on a judgment for seventy dollars damages and fifty-five 6-100 dollars cost, *in full of the same*, and made the following endorsement on the execution: "January 2, 1821. Received one hundred dollars in full discharge of this execution"; and the court held, that "the creditor may, perhaps, maintain an action against the attorney for making such a compromise, but this does not affect the debtor; he is not injured by being compelled to pay the whole debt."

In the case of *Smock v. Dade*, (5 Rand. 639,) which was a motion to quash an execution, on the ground that the debtor had paid the judgment to the attorney of plaintiff, in money and a bond on a third person, the court held, that "an attorney-at-law has no right to receive a bond from a debtor, in discharge of his client's claim, without the assent of the client. If he does, he is the agent, not of the plaintiff, but of the defendant, and the plaintiff may still proceed against the defendant."

In the case of *Jackson v. Bartlett*, (8 John. 285,) it is held, that an attorney has no "authority, from his general character, to discharge the defendant from execution on *ca. sa.*, until the money was paid."

In the case of *Baldwin et al. v. Merrill*, (8 Humph. 132,) the court say: "The attorney of the plaintiffs has no authority, as such, to receive a note, or any thing but money, in satisfaction of the judgment."

The case of *Commissioners, &c., v. Rose*, (1 Dess. Eq. 464,) was a suit against the debtor, who had paid the attorney of the creditor, in a currency different from that stipulated in the contract, and less valuable, and the attorney surrendered up the contract to the debtor; and the court held the debtor liable, saying: "The defendant Tunno having acted contrary to the trust or confidence reposed in him, the defendant Rose must seek redress against him, for whatever damages he may sustain. And as on the one hand, the State would have been bound by the defendant Moultrie's act, if he had actually received the specie or indents for Rose's debt; so on the other hand, as he has not received the specie or indents, Rose shall not be released from payment, although his bond has been cancelled. Creditors would be placed in a perilous situation, indeed, if, by the combination of an attorney with the debtor or his agent, a receipt, without payment of the money, should be deemed sufficiently valid to discharge the debtor from his obligation."

In *Fitch v. Scott*, (3 How. Miss. R. 314,) the court held, that "an attorney has no authority to compromise the claim of his client; and if he does so, he takes upon himself the consequences of its loss, or the damages which he may sustain."

In *Clark & Co. v. Kingsland*, (1 Sm. & Mar. 248,) the court say: "It is the business of an attorney to collect the money on claims placed in his hands for collection, and his authority as an attorney extends no further." It seems that the attorney of the plaintiff had received, in part payment of a judgment, an assignment of another judgment, and gave a receipt in payment and discharge, *pro tanto*, to the debtor, who, having paid the balance of the judgment, moved the court for an entry of satisfaction. The court further say: "Any receipt, given by an attorney for such security, although it profess to be in satisfaction or payment, is not binding on his client, nor is it a legal discharge

of so much of the debt. The attorney may, in this manner, make himself liable, and the client may rest content with that liability, if he chooses ; but, if he has obtained a judgment, he is not bound to relinquish it, and accept other securities which his attorney may have agreed to take."

In *Keller v. Scott*, (2 Sm. & Mar. 83,) the court say: "The general authority of an attorney is necessarily liberal and broad, during the progress of the suit, and up to the consummation of the judgment, and through the process of execution ; but it can not be permitted to extend to a power to alter or risk the rights of clients, by a substitution of the character of the satisfaction of the execution, without the consent of the plaintiff ; nothing short of the payment of the amount of the judgment, in *lawful money*, is a satisfaction of the execution."

The case of *Anketell v. Torrey*, (7 Sm. & Mar. 473,) is a case quite in point. The sheriff had received, by the consent of the attorney of plaintiff, payment of an execution in the notes of the Union Bank, which were current at the time. The court held, "that no payment of an execution, in any thing short of lawful money, to-wit, coin of the United States, will amount to a satisfaction, unless it be with the consent of the plaintiff in the execution."

In the case of *Lawson v. Bettison*, (7 Eng. 401,) the court say, that it had been adjudged by that court, "that an attorney-at law, who acts under his general authority as such, has no power to receive, nor to give directions for the receipt of, any thing but legal current money upon executions for their clients ; and that in such a case, the debt remained unpaid, and that the plaintiff in execution might elect to set aside the sheriff's return, and sue out an *alias* execution, or sue the attorney for the value of the debt collected." It is also, in effect, held, that "an attorney is not authorized to receive depreciated paper, *at its real value*, or other property, in payment of his client's judgment, unless by his *express* authority ; and if he receives such, may issue execution without regarding it as a payment."

It is also held, in the case of *McCarver v. Nealey*, (1 Iowa, 360,) "that an attorney has no right to receive any thing but money in satisfaction of a demand placed in his hands

for collection, unless especially authorized to do so by his client"; and in this case, the creditor was permitted to proceed against the debtor for the money.

In the case of *Walker v. Scott*, (8 Eng. 648,) the court say: "An attorney, under his general retainer, has no power to receive property in payment of his client's debt, not even depreciated paper"; that he "could not even have received payment in depreciated paper currency, though circulating at a small discount as money."

In *Trumbull v. Nicholson*, (26 Ill. 149,) which was a proceeding by the creditor against the debtor, who had satisfied a judgment to the attorney by a payment, in part, of depreciated bank-bills, the court say: "The attorney might as well take cattle, or corn, as any thing but money; or he might take less than the amount of the judgment, in full satisfaction, as to take depreciated currency"; and further: "But, admitting that he retained all his original powers, yet he was not authorized to receive any thing but money, or, at least, that which was equivalent, and actually treated as coin, in satisfaction of the judgment."

The case of *Bracket v. Norton*, (4 Conn. 517,) is not in conflict, but reconcilable, with the cases above cited. The only case I have found in the American reports, in antagonism to those cases, is the case of *Livingston v. Radcliff*, (6 Barr, 205,) in which the court intimates, that an attorney may receive, in part payment, "a note for two or three days, of a person of undoubted responsibility."

We will now notice, briefly, the decisions of this court. The case of *Kirk v. Glover*, (5 Stew. & P. 340,) was an action of trover, for the value of a bond, which the attorney of plaintiff had taken in payment of a judgment, without any authority from the plaintiff, and which the attorney had sold to the defendant Glover. The court held, that the attorney had "no right to take a bond in satisfaction of the judgment, without the consent of his client; but that the plaintiff might show a ratification of the act of the attorney in taking the bond, after the transfer of the bond, and that the fact of ratification is one for the determination of the jury, from all the circumstances of the case.

In the case of *Craig v. Ely*, (5 Stew. & P. 354,) a bill was

filed by a creditor against a debtor, to recover the balance due on a note, which had been surrendered by the attorney of the creditor to the debtor, in consideration of a new note executed by the debtor, payable to a third person, who was a surety on the original note, and to whom the attorney was indebted. The court held, that the attorney had no authority to make such an arrangement, and that the original debtors were liable; and that a bill in equity was sustainable on the facts of the case. *This*, and the case of *The Commissioners, &c., v. Rose*, (*supra*,) are the only cases where the creditor resorted to a court of equity to enforce his claim.

The case of *Gullet v. Lewis*, (3 Stew. 23,) was an action by the holder of a promissory note, against the maker, who had made an agreement with the attorney of the plaintiff to take another debt for it; but the note was not given up; and the court in which the case was tried charged the jury, that if they believed the witness held the note as agent or attorney of the plaintiff, and made an agreement with the defendant to take a note or debt due from himself in payment of the plaintiff's note, and that the contract was completed, although the note was not given up, that it did discharge the debt. On writ of error, this court held, that "an attorney at-law is the special agent of his client, whose duties, usually, are confined to the vigilant prosecution or defense of the suitor's rights. By virtue of his engagement as an attorney, he is not authorized to compromise the matter of controversy, to execute a release of his client's demand, or even to release the responsibility of a witness to his client, that he may be rendered competent. When a note is placed in the hands of an attorney-at-law to collect, the only power granted to him is to receive the money, if the payor will pay it without, or to enforce its payment by suit. He has no right to dispose of this note in payment of his own debts, or by compromise to receive goods, or horses, or any thing but cash, in discharge of the payor's responsibility. * * If, then, a debtor makes an arrangement with an attorney-at-law, in the employ of the creditor, by which he pays any thing else but money, it is not on account of the confidence which has been reposed in the

attorney by the creditor, but from the reliance which the debtor himself places on him."

In the case of *Cost v. Genette*, (1 Porter, 212,) an action was brought by the creditor against the debtor, who had paid the attorney of the creditor by surrendering a note the debtor held against the attorney, in payment of the note due the creditor; and the attorney gave up the note of the creditor to the debtor. The action was *assumpsit*. The court below gave judgment against the plaintiff; but this court reversed the same, holding that "an attorney was the especial agent of his client to receive the money upon the note committed to him, and that the act done by him was in violation of the authority granted, and so not binding on the principal."

The case of *West, Oliver & Co. v. Ball & Crommelin*, (12 Ala. 340,) was an action of *assumpsit*, to recover of the defendants the difference in value between a sum of money collected by them as attorneys-at-law of the plaintiffs, in bills of the Bank of the State of Alabama and its branches, and specie funds. The court say, COLLIER, C. J., delivering the opinion, that the attorneys had no right "to accept any thing in discharge of the liability but cash"; and further, "that a paper medium of currency is not money. And if an attorney collect bank-bills, in lieu of specie, without authority, he is responsible, as for a failure to collect. We think it clear that an attorney-at-law, in virtue of his general powers, has no authority to receive depreciated bank paper in payment of a debt placed in his hands for collection; and if he collects it in such funds, his client is not bound to accept it in satisfaction. The debtor can not discharge himself by a payment in any thing else than gold and silver, without the consent of his creditor; nor does the mandate of a *feri facias* require of the officer to make of the defendant's estate any thing else than gold and silver. And if he accepts bank-bills, which are selling at a discount, neither himself, nor the attorney of the plaintiff, can compel the latter to receive them as money." The court further held, that no usage of attorneys could vary the rule, and said: "It has been repeatedly decided, that the usage of no class of men can be supported in opposition to the established principles of law."

The case of *Cook & Lamkin v. Bloodygood*, (7 Ala. 684,) indicates that the plaintiff, where money has not been paid, may elect to proceed against the sheriff, the attorney, or the defendant, as the facts may authorize.

We have thus fully examined and cited the authorities, as the counsel for the appellee confidently rely on the case of *Haynes v. Wheat*, (9 Ala. 239,) as decisive of this case. Whatever may be the rule as to the liability of defendants in execution, whenever it is satisfied by an entry of the sheriff or clerk, the above authorities clearly show, that a payment to an attorney by the debtor, of any thing *not equivalent* to gold and silver, in satisfaction of a debt, without authority from the creditor, does not relieve the debtor from liability to the creditor. They also show that a creditor *may elect* to proceed against his attorneys, and hold them liable for gold and silver; and they can not discharge themselves from the payment of gold and silver, or reduce the amount of the recovery, by showing that they received depreciated currency, or only a part of the amount of the judgment, when they have receipted it in full.

The facts of this case do not show that the attorneys had any authority to receive the currency they did in satisfaction of the demand, or that their clients have ever ratified their act.—*West, Oliver & Co. v. Ball & Crommelin*, *supra*.

The last case cited is to be taken as authority upon the meaning of the words "*money*" and "*cash*," used in the other cases cited from the reports of this State; and we think it is decisive of this case, and fully sustained by the cases herein cited from the reports of our sister States.

Upon the evidence, the motion of the plaintiffs should have been granted.

The judgment of the court below must be reversed, and the cause remanded.

BARBOUR COUNTY *vs.* HORN.

[ACTION AGAINST COUNTY FOR DAMAGES CAUSED BY FALL FROM PUBLIC BRIDGE.]

1. *When action lies against county, for damages caused by fall from public bridge.*—To sustain an action against a county, for damages caused by a fall from a public bridge, which had been erected under contract with the court of county commissioners, (Code, § 1203,) the complaint must aver, either that no guaranty was taken, or that the period fixed by the guaranty, if one was taken, had expired before the injury happened: if a guaranty was taken, its insufficiency to afford adequate compensation to persons injured does not render the county liable to an action.
2. *Validity of bond or guaranty of contractor for building public bridge.*—Where a contract for the building of a public bridge is made by the court of county commissioners, and the contractor is required by such court to give a bond or guaranty for the sufficiency of his work, (Code, § 1203,) a bond or guaranty executed by him, in pursuance of such requisition, is not void because taken by the probate judge; nor because it is made payable to the probate judge and his successors in office.
3. *Presentation of claim against county.*—A claim against a county, for damages caused by a fall from a public bridge, must be presented for allowance like other claims, (Code, §§ 775, 2141,) before an action can be maintained on it against the county.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. J. McCaleb Wiley.

THIS action was brought by W. D. Horn, against the county of Barbour, and was commenced on the 20th February, 1859. The complaint was in the following words:

“Plaintiff claims of the defendant the sum of twenty thousand dollars, for injuries sustained by him on account of the loss of his health, and the permanent use of his limbs, resulting directly and immediately from his fall from a certain bridge across ‘Lick creek’ in Barbour county; which bridge had been built by contract with the court of county commissioners for said county, over said creek, on the public highway in said county leading from Glenn-

ville to Clayton. Said bridge was built by the order, and under the contract with said commissioners' court; and plaintiff avers, that the only guaranty, by bond or otherwise, required by the said court of the builders of said bridge, that it should continue safe for the passage of travellers and other persons for the time stipulated in said contract, was a bond for the sum of one hundred and thirty-two dollars. Plaintiff avers, that said bridge was defective, unsound, and unsafe; and when thus defective, unsound, and unsafe, and before the expiration of said insufficient guaranty, to-wit, on the 28th October, 1858, while said plaintiff was crossing said bridge in his buggy, drawn by his horse, the said horse become frightened at a hole in said bridge, and, by backing with said buggy, in consequence of said alarm, suddenly, and without any fault on the part of said plaintiff, and without any ability on his part to prevent or avoid its inevitable results, and in consequence of the said defective, unsound, and unsafe condition of said bridge, precipitated said plaintiff, with his said horse and buggy, over and from said bridge, into the stream below; thereby causing said plaintiff serious and permanent bodily harm, and producing such physical disability as greatly to impair his health, and to destroy his power of locomotion, and his ability to work or do any labor, and also greatly damaging the horse and buggy. Plaintiff avers, that he is ready and willing to accept the guaranty of said bond, so far as it goes, towards repairing said damages; but he alleges that said bond is wholly insufficient for said guaranty, and fails, to the amount of — dollars, to indemnify him for said injuries, and to afford him such remedy and guaranty as the law secures to him in the premises.

"Plaintiff also claims the further sum of twenty thousand dollars, as damages, which he has sustained by the loss of his property, and by reason of injuries inflicted on his person, by being thrown from a public bridge kept up by said county, to-wit, in October, 1858; the said county being bound to keep said bridge in a safe condition for the passage of the public, and, by its failure to do so, is responsible to the plaintiff for the damages which he has sustained

by reason of said neglect; and plaintiff avers, that his account, or claim, for said damages, was regularly presented to the court of county commissioners, for allowance and payment, and that the said court refused to allow or recognize said claim, or any part thereof."

"To this declaration," the bill of exceptions states, "the defendant demurred, on the ground that the county was not liable, because the builder of the bridge had given a guaranty, which had not expired when the plaintiff received the injury; and because the declaration nowhere avers that a guaranty had not been taken, or that the period of a guaranty had expired. The court overruled the demurrer, and the defendant excepted. The defendant also demurred to each count in the declaration separately, but the court overruled the demurrer, and the defendant excepted."

On the trial, as the bill of exceptions further shows, the plaintiff read in evidence, from the records of the court of county commissioners, all the proceedings relating to the building of said bridge, consisting of the following papers: 1st, the order of the court appointing commissioners to let out the building of the bridge by contract; 2d, the report of the commissioners; 3d, the order in favor of the contractor for the payment of the stipulated price; and, 4th, the bond, or guaranty, executed by the contractor. The order appointing the commissioners was in these words: "Ordered, that Green Beauchamp, W. D. Horn, and Jacob Lowman, be appointed commissioners to contract for the erection of a new bridge over Lick creek, at the Beauchamp camp-ground, requiring the undertaker to enter into bond, with good security, to keep the same in good passable order for six years from the date of its completion." The date of this order is not shown by the record. The commissioners reported, on the 6th December, 1852, that they had let out the contract for the building of the bridge to Hansford Dowling, as the lowest bidder, at the price of sixty-six dollars, and that the bridge had been completed according to the stipulations of the contract; and they therefore recommended that the bridge be received, and that the agreed price be paid to the contractor, "when he executes his bond, with approved security, that said bridge

be kept up for the term of six years." The order for the payment of the money to the contractor is without date, and simply directs that he "be allowed, out of the county treasury, sixty-six dollars, for building a bridge over Lick creek." The contractor's bond, or guaranty, which is in the penal sum of one hundred and thirty-two dollars, and payable to "Wm. R. Cowen, judge of the probate court, and his successors in office," was conditioned as follows: "The condition of the above obligation is such, that, whereas the above-bound Hansford Dowling was the lowest bidder and undertaker for the building of a bridge over Lick creek, at the place known as 'the camp-ground bridge,' for the sum of sixty-six dollars; and whereas the said bridge *having* been completed, in accordance with the specifications agreed on at the time of the letting,—now, if the said Dowling should keep the said bridge in good repair, for the term of six years, then this obligation to be null and void," &c. The record does not show that there was any endorsement on the bond in relation to its acceptance, approval, or filing. The probate judge testified, "that there was no other guaranty in his office than the one above set forth, and no other records in relation to the contract or matters pertaining to the bridge." There was other evidence introduced on the trial, but it all related to the character of the injuries which the plaintiff had received, or to the manner in which the accident happened. The defendant objected to the admission of the records as evidence, and excepted to the overruling of the objections on this point; none of which, however, require special notice.

"The above being all the evidence in the case, the court charged the jury, among other things, that the plaintiff could recover in this action, independently of the remedy given in section 1203 of the Code, provided the evidence showed that the guaranty taken by the court of county commissioners was insufficient to compensate the plaintiff for the damages proved to have been sustained by him, and that the remedy given by said section 1203 was merely cumulative. To this charge the defendant, by its counsel, excepted."

The several rulings of the court on the pleadings and

evidence, and the charges to the jury, to which exceptions were reserved, are now assigned as error.

STONE, CLOPTON & CLANTON, and D. M. SEALS, for the appellant.—1. Counties are made territorial corporations by statute, with governmental powers, and capacity to sue and be sued; but they are not liable to an action at common law.—*Russell v. Men of Devon*, 2 Term Rep. 667; *Ward v. Hartford County*, 12 Conn. 404; *Mower v. Leicester*, 9 Mass. 247. Section 763 of the Code does not specify the cases in which a county may be sued, but leaves that question to be determined by other statutory provisions.

2. Section 1208 of the Code plainly gives an action against the county, for damages caused by the insecurity or insufficiency of a public bridge; but the liability is confined, by implication equally clear, to cases in which no guaranty has been taken, or in which the period fixed by the guaranty has expired. If no guaranty has been taken, or if the period fixed by the guaranty has expired, an action may lie against the county; but, if a guaranty has been taken, and has not expired, its insufficiency gives no action against the county. In taking a guaranty, or in failing to take one, the county commissioners act as a court; and whether their action, or non-action, is based on corrupt or other improper motives on the part of the officers of the court, whatever may be the liability of those officers individually, the county is not responsible.—*Hickok v. Trustees of Plattsburg*, 15 Barbour, 427; *Bailey v. Mayor of New York*, 3 Hill, 531; *Barbour County v. Brunson*, 36 Ala. 362; 26 Ala. 498; 9 Mass. 249.

3. An action can not be maintained against a county, on any kind of claim, until the demand has been presented for allowance to the court of county commissioners, and either disallowed, or reduced and refused.—Code, §§ 775, 2141. The averment in this case, as to the presentation and rejection of the plaintiff's claim, is not sufficient, because the time when it was made was not alleged. *Non constat* that it was made within the time required by law, (Code, § 775,) and was rejected on that account.

tra.—1. The general rule is, that the county is liable for all such injuries as were alleged and proved by the plaintiff below.—*Smoot v. Mayor of Wetumpka*, 24 Ala. 112, and cases there cited in brief of appellant's counsel. The remedy against the contractor, given by section 1203 of the Code, is cumulative merely, and does not take away the remedy against the county. The contractor's bond or guaranty, which is usually in the penalty of double the price paid him, must necessarily furnish, in most cases, very inadequate compensation to persons injured; and if there is no liability on the county in such cases, we have the anomaly in the law of a right without a remedy.

2. If section 1203 was intended to create an exception to the general liability of the county, then it is to be strictly construed, and the particular case must be clearly brought within its provisions. In making a contract for the building of a bridge, and in taking a guaranty from the contractor, the court of county commissioners exercises a special jurisdiction, and all the facts must affirmatively appear on its record.—*Gunn v. Howell*, 27 Ala. 663; *Keenan v. Commissioners' Court*, 26 Ala. 568; *Wyatt v. Rambo*, 29 Ala. 510. In requiring a guaranty, fixing its amount, and accepting the guaranty offered, the commissioners act as a court, and exercise judicial (or, at least, *quasi-judicial*) power, which can not be delegated to the probate judge, or to any other person.—*Butler v. Foster*, 14 Ala. 323; *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136. In this case, the record fails to show that the guaranty was taken by the court, or that the court fixed its amount, or decided upon its sufficiency, and accepted it; on the contrary, it shows, by clear implication, that all these things, if done at all, were done by the probate judge. The bond thus failing in all the essential requisites of a statutory guaranty, the case is not brought within the exception, and the right of action against the county is not taken away.

3. The guaranty can not be upheld as a valid common-law bond, because the probate judge had no authority to take it, and no interest or property in it, or in the subject-matter to which it related. "If an affirmative statute, which is introductive of a new law, direct a thing to be

done in a certain manner, that thing shall not be done in any other manner, although there are no negative words." *Calhoun v. Lunsj rd*, 4 Porter, 345; *Mortimer v. Piggott*, 2 Dowl. Pr. 616; Smith on Statutes, § 667. The distinction is broad, and well recognized, between bonds which are given to parties who have a capacity to take, and bonds which are given to parties who have no such capacity: the former may be good in part, while the latter are wholly void.—*United States v. Bradley*, 10 Peters, 360; *Jackson v. Simonton*, 4 Cranch, C. C. 255; *Slade v. Washburn*, 3 Ired. L. 562. This distinction underlies and reconciles the following decisions of this court: *Jackson v. Governor*, 15 Ala. 703; *Butler v. Foster*, 14 Ala. 323; *VanDyke v. The State*, 24 Ala. 81; *Walker v. Chapman*, 22 Ala. 116; *City Council of Montgomery v. M. & W. Plank-road Company*, 31 Ala. 76; *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136; *Seawell v. Franklin*, 2 Porter, 493; *Butler v. O'Brien*, 5 Ala. 316; *Whitsett v. Womack*, 8 Ala. 466; *Brale v. Clark*, 22 Ala. 361.

4. Even if the bond be held good at common law, it will not bring the case within the statutory exception. As a common-law bond, an action on it could only be maintained in the name of the obligee, or some one of his successors, for the use of the person injured.—*Sprowl v. Lawrence*, 33 Ala. 684. Section 1203 of the Code provides for a suit on the guaranty in the name of the person injured, and, consequently, applies only to bonds or guaranties on which such actions can be maintained.

JUDGE, J.—Section 763 of the Code declares, that "every county which has been, or may be established in this State, is a body corporate, with power to sue and be sued in any court of record."

This section of the Code does not prescribe on what causes of action a county may, or may not be sued; this question is to be determined by other statutes, and settled principles of the law applicable to suits by or against such or similar corporations. The action in the present case, in so far as the right to institute and maintain it is concerned, is governed entirely by statutory enactments, and it is un-

necessary, therefore, to enter into an examination of the general question; as bearing upon it, however, we cite the following adjudications of this court: *Smoot v. Wetumpka*, 24 Ala. 112; *Gilmer v. City Council of Montgomery*, 33 Ala. 116; *Dargan v. Mayor, &c.*, 31 Ala. 469; *Mayor of Mobile v. Rowland & Co.*, 26 Ala. 498; *Barbour County v. Brunson*, 36 Ala. 362.

Section 1203 is as follows: "When a bridge or causeway has been erected by contract with the county commissioners, with a guaranty, by bond or otherwise, that it shall continue safe for the passage of travellers and other persons for a stipulated time, any person injured in person or property before the expiration of such period, by a defect in such bridge or causeway, may sue in their own name on the bond or other guaranty, and recover damages for the injury; and if no guaranty has been taken, or the period has expired, may sue and recover damages of the county."

It is averred in the first count of the complaint, that the bridge, the unsafe condition of which is in question, was built under a contract with the court of county commissioners; that a guaranty by bond was taken from the builder, in the sum of one hundred and thirty-two dollars, conditioned that the bridge should continue safe for the passage of travellers and other persons for the time stipulated in the contract; that the appellee sustained the injuries sued for by him, before the expiration of the guaranty; and that the bond is wholly insufficient in amount to secure adequate compensation to the plaintiff for the damages sustained by him in consequence of the unsafe condition of the bridge. The second, and only other count, contains no averment whatever in relation to a guaranty. It was assigned as cause of demurrer to the entire complaint, "that the county was not liable, because the builder of the bridge had given a guaranty, which had not expired when plaintiff received the injury; and because the complaint nowhere avers that a guaranty had not been taken, or that the period of a guaranty had expired."

The demurrer to the complaint involves the necessity of a construction of section 1203 of the Code, before quoted.

The language of this section is plain and explicit. Within the letter and meaning of the section, if no guaranty has been taken, or the period of one taken has expired, the county may be sued; if a guaranty has been taken, the county can not be sued, no matter what the proportion of the amount of damages sustained may be to the amount of the guaranty. In expressing the contingencies in which a county may be sued and damages recovered, on a cause of action like the present, we hold that it was the intention of the legislature to exclude the right to sue in any other than the contingencies named, under the familiar maxim, "*Expressio unius est exclusio alterius.*"

Were we to hold that, when the amount of the guaranty taken is insufficient to make adequate compensation for damages sustained, that then the county may be sued, we would not only be assuming the exercise of a function properly belonging to the law-making department, but would establish a rule under which it might be difficult, in many cases, to determine whether a right of action against the county existed or not; the liability of the county depending upon the question, whether or not the damages exceed the amount of the guaranty, and the damages being unliquidated, incapable of legal ascertainment but by a verdict. Under such a rule, the *amount* of the verdict would be the test as to whether a right of action existed or not.

It is not, as is supposed by counsel, made the duty of the court of county commissioners, when a bridge or causeway has been erected by contract with them, to take a guaranty of the character designated in the Code. Nor, if such a guaranty be taken, is any rule prescribed as to what shall be its extent; but, if none be taken, as before remarked, the county, in a proper case, may be sued. It would be impossible to foresee, in any case, the amount of damages which might result from a defective or unsafe structure of the kind; and if a guaranty should be required in each case sufficient to cover the contingency of large damages that might accrue, the result would probably be to prevent, to a great extent, the making of such contracts; for, when the structure intended to be erected would not be costly, as was the fact in the case before us, and the profits

of the contractor would therefore be small, a person could hardly be found willing, under such circumstances, to incur, as contractor, such heavy responsibility.

It results from what we have said, that the circuit court erred in overruling the demurrer to the complaint, and also in giving the first charge stated in the bill of exceptions.

The conclusion attained by us will probably be decisive of the case; but two other points suggested by the record, and argued by counsel, we will briefly notice.

2. It is insisted that the bond relied on in this case as a guaranty, is a nullity, because it was not taken by the court of county commissioners, who alone had the authority to take it, but is payable to the "judge of the probate court and his successors in office," when the judge of the probate court, as such judge, had no authority or jurisdiction to take such guaranty.

If the bridge was built under a contract with the court of county commissioners, and the bond in question was executed by the contractor pursuant to a requirement of said court, and as one of the conditions on which he was to build, or received the contract price for building the bridge, then the bond is not void, but is a valid bond, although it be payable to the judge of the probate court, *eo nomine*, and his successors in office.—*Seawell v. Franklin*, 2 Porter, 493; *Buller & Alford v. O'Brien*, 5 Ala. 316; *Whitsett v. Womack*, 8 Ala. 466. It is not required by the Code that it should have been made payable to the court of county commissioners, nor to any particular officer; hence, the authorities cited by the appellee upon this question, do not apply. The judge of probate in each county is "*principal judge*" of the court of county commissioners, and the keeper of the records of said court; is in fact the clerk, as well as the presiding judge of the court.—Code, §§ 697-705. And he may well be the actor in the taking of such a bond, when it is executed pursuant to an order of the court. And in such cases, any act which is intended by the obligors as a *delivery* of the instrument, will be so treated.—See *Sproul v. Lawrence*, 33 Ala. 674, and cases cited in the opinion of the court upon this point, on page 692.

3. Under sections 775 and 2141 of the Code, no suit can

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be brought against a county, until the claim or demand has been presented within twelve months after it accrues, or becomes payable. Our construction is, that these sections apply to suits for damages like the present, as well also as to claims or demands founded on contract.

Let the judgment be reversed, and the cause remanded.

GLOVER vs. TAYLOR & CO.

[ACTION FOR BREACH OF WARRANTY OF SOUNDNESS OF SLAVE.]

1. *Judicial notice of abolition of slavery.*—The courts are bound to take judicial notice of the fact, that slavery ceased to exist in Alabama prior to the spring of 1866.
2. *Replevin bond for delivery of slaves taken under attachment; excuse for non-performance.*—The condition of a replevin bond, executed in 1859, for the forthcoming of slaves taken under attachment, having become, by the abolition of slavery before forfeiture, both illegal and impossible of performance, the surety is discharged from all liability.
3. *Competency of discharged surety as witness for principal.*—The surety on a replevin bond for the delivery of slaves, having been discharged from liability on the bond by the abolition of slavery before forfeiture, is a competent witness for his principal.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. F. BUGBEE.

THIS action was brought by William Taylor & Co., against Robert D. Glover, to recover damages for the breach of a warranty of the soundness of a slave; and was commenced by original attachment, which was sued out on the 21st November, 1859. The attachment was levied by the sheriff, on the 23d November, 1859, on two slaves as the property of the defendant, which were replevied by him on the same day. The condition of the replevin bond recited the issue and levy of the attachment, and that the slaves attached had been returned to the defendant on the execution

of the bond, and then proceeded thus: "Now, if the said Robert D. Glover shall fail in the said action, he or his sureties shall or will return the said described negroes, Elijah and Albert, the specific property attached, within thirty days after judgment rendered in said cause, then this obligation to be void," &c.

On the trial, at the May term, 1866, as the bill of exceptions states, the defendant, by his attorney, (not being personally present,) offered one Powell as a witness, who was one of the sureties on the replevin bond. The plaintiffs objected to the competency of said Powell as a witness, "on the ground that he was interested in the event of the suit," and read the bond in evidence in support of their objection. The court sustained the objection, and excluded the witness; to which the defendant excepted. The defendant then proposed, in order to restore the competency of said Powell as a witness—1st, "to indemnify him against all loss or damage he might sustain by reason of his having signed said bond"; 2d, "to give said Powell a power of attorney to the clerk of the court, executed by parties amply solvent, authorizing said clerk to confess judgment in his favor, and against them, for whatever sum might be recovered by the plaintiffs in this suit, including the costs"; and, 3d, "to give to the plaintiffs a like power of attorney, executed by parties amply solvent, authorizing a confession of judgment in their favor, for whatever sum they might recover in this suit, including costs." The court rejected each of these proposals, as made separately, and refused to allow said Powell to testify as a witness; to each of which rulings and decisions exceptions were reserved by the defendant. The rejection of Powell as a witness, under the circumstances stated, is the only matter now assigned as error.

WATTS & TROY, for the appellant.—1. Powell was a competent witness for the defendant, without any release or indemnity; because the condition of the bond had become impossible of performance, by the destruction of property in slaves. The courts will take judicial notice of the abolition of slavery, and of the time when it occurred; and

whether it is to be regarded as the act of God, or of the legislature, or of the public enemy, or the *vis major* of political events, the effect is the same, and the non-performance of the contract is excused.—2 Parsons on Contracts, 184; *Falls v. Weisinger*, 11 Ala. 804.

2. There is a broad distinction between this case and the principle which applies in the action of detinue. In that action, if the plaintiff recovers, the previous death or destruction of the property does not discharge the defendant and his sureties from liability, but they are required to pay the value of the property.—Code, § 2470. The reason and justice of this statutory rule are found in this fact, that the judgment for the plaintiff, in that action, conclusively establishes that the defendant was a wrong-doer, and he can not be allowed to take advantage of his own wrong; whereas, in this case, there is no wrong done, and no breach or forfeiture of the contract, before the intervention of the irresistible act which makes performance impossible and illegal.

3. If Powell was incompetent, the court erred in refusing the defendant's several offers to restore his competency. *Webb v. Kelly*, 37 Ala. 333; *Drinkwater v. Holliday*, 11 Ala. 134; *Taylor v. Br. Bank at Huntsville*, 14 Ala. 633; *Bainbridge v. Hill*, 13 John. 125; 17 Wendell, 18; 7 Cowen, 358; 2 Smith's Leading Cases, 156.

RICE, SEMPLE & GOLDTHWAITE, *contra*.—1. The surety on a replevin bond is not a competent witness for his principal. Code, §§ 2536, 2538. The incompetency of such a witness can only be removed in the mode pointed out and prescribed by the statute.—Code, § 2286. If his competency could be restored by the substitution of a new bond, none of the offers made in this case came up to the requirements of the law.—*Gullet v. Lewis*, 3 Stew. 23; *Kirk v. Glover*, 5 Stew. & P. 359; *Lockhart v. Wyatt*, 10 Ala. 231; *Johnson v. Cunningham*, 1 Ala. 249; *Holker v. Parker*, 7 Cranch, 436; *Harper v. Scott*, 12 Georgia, 125; *Bailey v. Bailey*, 1 Bing. 91.

2. Where property, levied on under execution, is restored to the defendant on the execution of a forthcoming bond; and the same dies, or is destroyed, before the day for the

delivery thereof, without fault on his part," the obligors are not thereby discharged from liability, but are required to tender to the plaintiff the value of the property so lost or destroyed.—Code, § 2470. The same provision is extended, by section 2539, to replevin bonds in attachment cases. There is no good reason for making a distinction between the two kinds of bonds, even if the statute were silent. The obligors voluntarily assumed all risks to the property, and deprived the plaintiff of the opportunity of having the negroes sold under an order of court. The maxim applies to them, *Volenti non fit injuria*. In the analogous case of hiring, it has been decided by this court, that the loss of the slave's services, by any accident or event over which the plaintiff had no control, does not discharge or diminish the liability of the hirer.—*Bell v. Pharr*, 7 Ala. 807-13; *White v. Ross*, 5 Stew. & P. 133; *Bettis v. Taylor*, 8 Porter, 564, 575; *Jemison v. Cozens*, 13 Ala. 636; *Leslie v. Langham's Executors*, at the last term. The case last cited seems decisive of this; the same defense here set up being there relied on, and held inoperative.

3. There is a recognized distinction, in the application of the rule as to the effect to be attributed to the act of God, or inevitable events beyond the control of the parties, between a public duty or obligation imposed by law, and a private duty or obligation voluntarily assumed by contract. To excuse non-performance in the latter class of cases, "such a state of circumstances must be shown to exist, as that the contract is no longer capable of being performed, without a criminal compromise of public duty."—*Atkinson v. Ritchie*, 10 East, 530; *Touteng v. Hubbard*, 3 Bos. & P. 291; *Hudley v. Clarke*, 8 Term, 260; 4 C. & P. 295; 1 H. Bla. 65; 1 Ld. Raymond, 321; 3 M. & S. 270; *Clancy v. Oerman*, 1 Dev. & Bat. Law, 402. The condition of a replevin bond is in the alternative—either to deliver the property, or to pay the judgment.—Code, §§ 2536-39, 2470; *Nave v. Berry*, 22 Ala. 382. If one of these alternatives has become impossible, or illegal, the obligor is bound to perform the other.—Salkeld, 170, pl. 2; 1 Abbott's National Digest, 543, §§ 105, 106; *Atkinson v. Ritchie*, 10 East, 530-36; 3 Bos. & P. 300; *Dermot v. Jones*, 2 Wallace, 1; 3 Dutch-

er's (N. J.) R. 513; 25 Conn. 530. The civil law is the same as to alternative obligations.—Pothier on Obligations, §§ 245-6, 250-51, 621.

4. But, even admitting that the replevin bond is simply conditioned for the delivery of the slaves, and that the abolition of slavery excuses the performance of the condition, (in cases to which the doctrine applies,) and that the court will take judicial notice of the time when slavery was abolished in Alabama; still, the record does not show error in the exclusion of the witness. Error must be affirmatively shown, and can not be presumed; and the defendant, in order to bring himself within the principle here invoked in his behalf, ought to have shown that the slaves specified in the bond were in life, and in slavery, at the time slavery was abolished here; otherwise, he does not bring himself within the rule asserted. Suppose the slaves had died in his possession, before the abolition of slavery, or had been manumitted by him, or had escaped to a country where slavery did not exist; the subsequent destruction of slavery here would not discharge the liability of the sureties on the bond. As the defendant had the possession of the slaves under the bond, the *onus* as to these points was on him, in order to show an excuse for his failure to deliver. 1 Greenl. Ev. §§ 74, 77, 79; *Grier v. Campbell*, 21 Ala. 327; *Walker v. Palmer*, 24 Ala. 356; *Carroll v. Malone*, 28 Ala. 521; *Blackburns v. Crawford*, 3 Wallace, 176, 195.

A. J. WALKER, C. J.—The surety on a replevin bond, in an attachment suit, was excluded as a witness on the trial of the cause, upon the ground of interest. The bond, which was for the delivery of slaves, was executed in 1859; and the trial was had in 1866. At the time of the execution of the bond, the negroes, which the defendant and his surety contracted to deliver, were slaves. We judicially know, that before the trial, the bond being unforfeited, slavery ceased to exist in the State of Alabama, and that a compliance with the bond had become, by the law of the land, alike impossible and illegal. This being the case, we decide, that the non-performance of the covenants of the bond became legally excusable, and that the surety could

not be liable for a failure to deliver the property, and was, therefore, not incompetent from interest.

Upon the question, whether the death, before forfeiture, of property included in a replevin bond, without fault on the part of the parties, would excuse the non-delivery, the decisions of this court seem conclusive. In *Burgess v. Sugg*, (2 Stew. & P. 341,) a plea to a declaration on delivery bonds was held bad, because it only averred the death of the slaves levied on before suit, and did not show that the death occurred before forfeiture; the court expressing no opinion as to the effect of the death before the day specified in the bonds. Next, the case of *Perry v. Hewlett*, (5 Porter, 318,) presenting an analogous question, arose. The question was, whether the hirer of a slave, who had covenanted to return it at the expiration of the term, was excused for non-compliance by the death of the slave. The question was decided in the affirmative, upon a full examination of authorities.

In the case of *Morrow v. Campbell*, (7 Porter, 41,) a failure to deliver a deed was attempted to be excused, upon the ground of its loss. The court, in holding the excuse insufficient, said: "To excuse the performance of an express covenant, it must be shown, either that it is prohibited by law, or that its performance has become impossible, by the intervention of causes which human agency could not prevent. To illustrate the latter excuse: If one rents a house, which he stipulates to repair; if it be destroyed by lightning, he shall notwithstanding rebuild it, because this is possible. But, if one rent land, and covenant to redeliver it to the landlord, in as good condition as when he received it; yet, if the timber is prostrated by a tempest, he shall not be held to a performance, because the injury was a result beyond human prevention, and reparation impracticable."

The decision in *Givhan v. Dailey*, (4 Ala. 336,) holding that death excuses the non-performance of a contract of service for one year, seems to recognize the principle, "that if a party is disabled by an act of God, before breach of his contract, he shall be excused from the performance." For illustration, the court puts this example: "If one man

lend his horse to another, who promises to return him by a day certain; if the horse die before the day, without the borrower's fault, the re-delivery will be excused."

In the case of *Falls v. Weisinger*, (11 Ala. 801,) a bond was executed for the delivery of property seized by virtue of process issued from the chancery court. All the property, except one slave, was delivered as required by the decree, and that slave died before the decree was rendered. The question thus arose directly, whether the death of the slave, without fault, and before forfeiture, excused the failure to deliver according to the condition of the bond. The question was decided in the affirmative. The conclusion of the argument upon the point is as follows: "The party to whom the slaves were delivered by the sheriff upon the execution of the bond, may be regarded as a bailee, and the obligors as stipulators for their delivery upon the condition provided for; and the effect of the death of the slaves will thus far excuse a non-performance, in the same manner as if the case were an ordinary bailment with or without hire."

Addison, in his work on Contracts, states the doctrine of the inexcusableness of non-performance of contracts very strongly (pp. 1123, 1130); yet he says: "This rule of law is subject to certain qualifications, for we have seen, that if a person receives a bag of money, or a specific chattel, upon a contract to deliver it to any particular party, or at any particular place, a loss by robbery with irresistible violence is an excuse for non-performance of the contract to deliver." Another writer on contracts says: "If the performance of a contract becomes impossible by the act of God—that is, by a cause which could not possibly be attributable to a promisor—and this impossibility was not among the probable contingencies which a prudent man should have foreseen and provided for, it should seem that this would be a sufficient defense." The same author says, that illegality of performance, arising after the contract, is an "impossibility by act of law; and it is put on the same footing as an impossibility by act of God, because it would be absurd for the law to punish a man for not doing, or in

other words require him to do, that which it forbids his doing."—2 Parsons on Contracts, 672-674.

In this case, we have a bond for the delivery of property, which was held under a bailment, as defined in our own decision of *Falls v. Weisinger*, *supra*. The delivery of this property is impossible, because emancipation has destroyed the quality of property in the subjects of the bailment, and illegal, because to deliver would violate the law; and this is the result of the *vis major* of political events, which no human sagacity could anticipate. In holding that the performance of such a contract is excused, we are within the principle announced by the decisions and authors which we have quoted. We are not called upon, and therefore do not attempt, to harmonize them, or to determine whether some may not go too far in one direction, and some too far in the other.

By the Code, (§§ 2470, 2539,) a special provision is made for the case of the death of replevied property; but this regulation does not extend to the cases of the destruction of property by emancipation. The cases which we have collated show that, at common law, as understood in this State, and declared by decisions which we should not disregard, a destruction of property by death, or by the law, without fault, would excuse its non-delivery. The provisions of the Code to which we refer, may be regarded as an exception from the general principle of the cases where death intervenes. The inclusion within the exception of the single case, is an exclusion of others. "*Inclusio unius est exclusio alterius.*"

There is no room for an application of the doctrine, frequently asserted, but sometimes questioned, that a statutory revision of an entire legal subject is a repeal of the pre-existing law. There has not been by the Code a revision of the pre-existing law on the subject of excuses for the non-delivery of replevied property. So far from being a revision of the entire subject, the Code singles out one branch of the general subject, for special regulation, and thus opens the door for an application of the maxim, which we have quoted above.

The contract of a replevin bond is not for the delivery of

the property, or the payment of the judgment, in the alternative. It is simply for the delivery of the property; and the authorities cited in reference to contracts in the alternative, one alternative being legal, are not pertinent.

A performance of the contract is, as we have already seen, illegal. Becoming illegal, no action could be maintained on it. It stands now in the same category, as if it had been illegal in its inception. No action can be maintained against a man for not doing what it would be illegal for him to do. His ability to do the thing has nothing to do with the question.

The witness was competent; and for the error of his exclusion, the judgment is reversed, and the cause remanded.

We refer to *Haralson v. Walker*, (23 Arkansas, 415,) as an authority supporting the main propositions of this opinion.

JUDGE, J., not sitting.

FLANAGAN vs. MEYER & CO.

[ACTION ON PROMISSORY NOTE, BY PAYEE AGAINST MAKERS.]

1. *Contracts made on Sunday*.—There is a material difference between the provisions of the Code, (§§ 1571, 3302-03,) and the provisions of the act of 1803, (Clay's Digest, 592, § 1,) in relation to violations of the sabbath by contracts or worldly business: the act of 1803 prohibited all worldly business on that day, while the inhibition of the Code is restricted to certain specified acts, and, being penal in its character, must receive a strict construction.
2. *Same*.—The writing and signing of a note on Sunday is not a contract, unless it is also delivered on that day; nor does the statute (Code, § 1571) prohibit the writing and signing of a note on that day, and delegating to another, either expressly or by implication, authority to deliver it to the payee on another day.
3. *Same*.—In an action on a promissory note, signed by two sureties and their principal, as joint makers; the only evidence in the case showing, that the note was written on Sunday morning, at the house of one of the sureties, and was then and there signed by said surety and

the principal, (the other surety and the payee not being present,) and that the principal then took it and rode away; the court may properly refuse to instruct the jury, at the instance of said surety, "that if she was only surety on the note, and if all she did in relation to the execution of it was done on Sunday, they can not find against her"; and may also refuse to instruct them, at the instance of the principal, "that if he signed the note on Sunday, and there was no proof as to when it was delivered, they could not find against him."

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. GEO. GOLDTHWAITE.

THIS action was brought by Joseph Meyer & Co., against Jonathan Flanagan, Anne Key, and Milton H. Berry; was founded on a promissory note for four hundred and fifty dollars, executed by the defendants as joint makers, dated the 12th January, 1861, and payable one day after date; and was commenced on the 18th March, 1861. The defendants pleaded, "in short by consent, that the note which is the cause of action, was executed on Sunday"; and issue was joined on this plea. "On the trial," as the bill of exceptions states, "the plaintiffs having read in evidence the note declared on, the defendants introduced a witness, who swore, that he wrote the said note, on Sunday morning, January 13th, 1861, at the house of the said Anne Key; that said note was then and there signed by said Flanagan and Anne Key; that said Flanagan then took possession of it, and rode away; that said Flanagan was the principal in said note, and said Anne Key was surety; that the plaintiffs lived about fifteen miles distant; that Berry was not present, and did not then sign the note. This was all the proof. The defendant Key requested the court to charge the jury, that if they found, from the evidence, that she was only surety on said note, and that all she did in relation to the execution of said note was done on Sunday morning, then they could not find against her. The defendant Flanagan asked the court to instruct the jury, that if they found, from the evidence, that he signed said note on Sunday, and there was no proof as to when said note was delivered, then they could not find against him. The court refused each of these charges, and to each refusal the

party asking the charge excepted." The refusal of the charges asked is now assigned as error.

STONE, CLOPTON & CLANTON, with whom was W. C. GRIFFIN, for the appellants.—1. The act of Mrs. Key, in signing the note on Sunday, was void, and imposed no liability on her.—Code, § 1571; *O'Donnell v. Sweeny*, 5 Ala. 467; *Dodson v. Harris*, 10 Ala. 566; *Saltmarsh v. Tuthill*, 13 Ala. 406. Being void, no subsequent ratification, acknowledgment, or other act, could validate it.—*Shippey v. Eastwood*, 9 Ala. 198; *Butler v. Lee*, 11 Ala. 885; *Bumgardner v. Taylor*, 28 Ala. 687.

2. The presumption is, that a promissory note was executed on the day of its date; *a fortiori*, when it is proved to have been written and signed on that day, it will be presumed to have been delivered also.—1 Phil. Ev. 367, note 4; *Aldridge v. Br. Bank at Decatur*, 17 Ala. 45; 1 Salk. 485. This being the legal presumption, the burden of proof to the contrary is on him who asserts that it was delivered on another day.

3. If the note was delivered by Mrs. Key to Flanagan, to be delivered by him to the payee on another day, such act on her part would be a contract, and within the prohibition of the statute. The precise question was decided in *Clough v. Davis*, 9 N. H. 500; which case was cited and approved by this court, in *Saltmarsh v. Tuthill*, 13 Ala. 390. That the delivery to Flanagan, with authority to deliver to the payee, constituted a contract, see 1 Parsons on Contracts, 580–81; Story on Bailments, §§ 137–40; 8 Metc. 91; 8 Missouri, 109; *Rutledge v. Townsend, Crane & Co.*, 38 Ala. 706. To say that a man may create an agency, to do that which he can not himself lawfully do, presents a moral absurdity. "The power of constituting an agent is founded upon the right of the principal to do the business himself."—Story on Agency, § 481. Suppose an infant, or a married woman, executes a power of attorney, or appoints an agent, and the agent executes the authority after the removal of his principal's disability; is the principal bound by the act?

CLEMENTS & WILLIAMSON, *contra*.—Delivery is an essential part of the execution of a note. In this case, there was

no proof whatever as to the time of delivery. It was shown, however, that Berry was not present, and had not signed the note, when the other defendants signed it; and that the payees lived fifteen miles distant. Under these circumstances, the jury might well have believed that the note was not completed and delivered until the next day; especially, as a delivery on that day, which would have completed the contract, would have been an unlawful act. The charges asked were properly refused.

JUDGE, J.—Prior to the adoption of the Code, under the statute of 1803, which was then of force, “no worldly business, or employment, ordinary or servile work, (works of necessity or charity excepted,) could be done, performed, or practiced, by any person, or persons within this State, on the Christian sabbath, or first day of the week, commonly called Sunday;” and every person offending against this statute, of the age of fourteen years or upwards, rendered himself liable to a fine for every such offense.—Clay’s Digest, 592, § 1.

The principle, that a penalty inflicted by a statute upon the doing of an act, is equivalent to a prohibition, has been often recognized by this court; and applying this rule, it has also been repeatedly held, under the influence of the statute above cited, that a contract made on Sunday is void.—*Saltmarsh v. Tuthill*, 13 Ala. 406, and cases there cited; *Hooper v. Edwards*, 18 Ala. 280; *S. C.*, 25 Ala. 528; *Rainey v. Capps*, 22 Ala. 288; *Hussey v. Roquemore*, 27 Ala. 281; *Bumgardner v. Taylor*, 28 Ala. 687. In *Saltmarsh v. Tuthill*, (*supra*,) it was held, under the same statute, that the endorsement of a bill on Sunday, and delivery of it to the acceptor, to be used for his accommodation, was “worldly business,” although the acceptor did not negotiate it until Monday, or some subsequent day; that the transaction on the part of the endorser was not “the mere writing his name, but included an authority to the acceptor to negotiate;” and that the transaction was void.

But the act of 1803 was materially changed by the adoption of the provisions of the Code on the same subject. Section 1571 provides, that “all contracts made on Sunday,

unless for the advancement of religion, or in the execution, or for the performance of some work of charity, or in case of necessity, are void." Section 3302 imposes a fine upon "any person who, on Sunday, compels his apprentice or servant to perform any labor, except the customary household duties of daily necessity, comfort, or charity;" and section 3303 provides for the punishment, by fine, of "any person who engages in shooting, hunting, gaming, racing, or in any other sport, diversion, or pastime, on Sunday, or any merchant, or shop-keeper, except druggists, who keeps open store, or disposes of any goods on Sunday." The principal difference, it will be perceived, between the statute of 1803 and the provisions of the Code above cited, is, that by the former *all worldly business* on a Sunday was prohibited; whilst by the latter, the inhibition is restricted to *certain specified acts*; and being penal in their character, these provisions must receive strict interpretation.

The writing and signing a note on Sunday, is not the execution of it on that day, unless it be *delivered* the same day to the payee; delivery being essential to make it operative as a contract.—*Saltmarsh v. Tuthill, supra*, and authorities there cited. Nor is it prohibited by our statute law, as it now exists, that one shall sign a note on Sunday, and, expressly or impliedly, delegate authority to another to deliver it to the payee on some subsequent day of the week.

When Mrs. Key signed the note sued on in this case, as the surety of Flanagan, and gave to Flanagan the possession of it, it could have been for no other purpose than to be delivered to the payees; and if it was delivered on any other day than Sunday, it was binding upon her as a valid contract. If the charge requested by Mrs. Key had been given, the jury would have been restricted by it to the consideration of what she herself did, on Sunday, in relation to the note; and no verdict could have been rendered against her, even though the jury might have believed there had been a valid delivery of it on some subsequent day. The court, therefore, properly refused to give this charge.

The charge requested by Flanagan was, in effect, that under the circumstances of the case, the burden of proof was upon the plaintiffs, to show that the note had not been

delivered on Sunday. It was for the jury to say, whether, under all the circumstances, it had been delivered on Sunday, or not; the note bearing date on a different day. When the note was signed by Flanagan and Mrs. Key, it was still not perfected, as another signature was afterwards procured; and when it was thus signed, the plaintiffs, who lived fifteen miles distant, were not shown to be present, and no notice was traced to them that it had been signed by either of the parties on Sunday. Under these circumstances, there was no error in the refusal to give this charge.

Judgment affirmed.

NOTE BY REPORTER.—On a subsequent day of the term, in response to an application by the appellants' counsel for a re-hearing, the following opinion was delivered :

JUDGE, J.—In support of the application for a re-hearing, the case of *Clough v. Davis*, (9 N. H. 500,) is relied on as authority. It is sufficient to remark of that case, that it was decided under the influence of a statute similar to the statute of 1803 of this State. It was under the latter statute that the case of *Saltmarsh v. Tuthill*, (13 Ala. 390,) was decided, which decision is in harmony with the New Hampshire case, and neither is an authority against the opinion delivered in this case.

In support of the correctness of the opinion, we quote from 2 Parsons on Contracts, page 763 : " If a contract is commenced on Sunday, but not completed till a subsequent day; or if it merely grew out of a transaction which took place on Sunday, it is not for this reason void. Thus, if a note is signed on Sunday, its validity is not impaired if it be not delivered on that day."—See, also, *Butler v. Lee*, 11 Ala. 885. The cases cited by the author above named, consisting of decisions of several of the States made under the influence of statutes similar to our own, fully sustain the doctrine of the text.

But it is insisted, that the act of Mrs. Key, in delivering the note to Flanagan, to be delivered to Meyer & Co., was itself a contract, within the prohibition of section 1571 of

the Code. We hold, that Mrs. Key made no contract on Sunday with Flanagan. It takes two or more to make a contract, and it must be founded on a valuable consideration. For the benefit and accommodation of Flanagan, and without valuable consideration moving to her therefor, she signed the note as his surety, having no interest in its being delivered to the payees, and being under no obligation, legal or moral, to deliver it, or have it thus delivered. If Flanagan should become bound by it, then it was to be binding on her; but otherwise, not. Neither did Mrs. Key make any contract with the payees of the note, until it was *delivered* to them; and they could have had no right of action, either against her or Flanagan, for its non-delivery. It seems to us too clear for argument, that what Mrs. Key did in the premises on Sunday, did not amount to the making of a contract, and therefore is not within the prohibition of the statute; nor was what she did in violation of any rule of the common law. By the common law, no *judicial act* could be done on Sunday. But, as to the making of contracts, and all other acts, not of a judicial nature, the common law made no distinction between Sunday and any other day.—2 Parsons on Contracts, 757, note n.

But it is contended, that the opinion seems to present a moral absurdity, in holding that, under the circumstances of the case, the note was a binding contract on Mrs. Key, if it was delivered to the payees on any other day than Sunday. If such be the fact, the law, and not the court, is responsible for it. It may seem inconsistent, and a "moral absurdity," that the legislature should have declared void all contracts made on Sunday; should have imposed a fine on any person who compels his apprentice or servant to perform labor on that day, except it be "the customary household duties of daily necessity, comfort, or charity;" should have provided for the punishment of any person "who engages on Sunday in shooting, hunting, gaming, racing, or in any other sport, diversion, or pastime;" should have prohibited any "merchant, or shop-keeper, except druggists, from keeping open store, or disposing of any goods," on Sunday; and yet have left the blacksmith, the carpenter, and every other artificer, and every person what-

soever except those specially prohibited, *at full liberty to ply their respective vocations on the same day*. Such, however, is the state of the law, and we have not the power to change it, if we would.

It should be borne in mind, however, as we have held at the present term, that "the legislature is under constitutional restrictions against compelling the observance of a Christian, or Jewish, or any other religious institution, because it is such"; and that the power to legislate "on the subject of abstaining from worldly employments on the first day of the week, is referred to the police power of the legislature."—*Mayor & Aldermen of Mobile v. Frolickstein*, at the present term.

After carefully considering the argument in support of the application for a re-hearing, we feel constrained to overrule the application.

MAYOR AND ALDERMEN OF MOBILE *vs.* WARING.

[BILL IN EQUITY TO ENJOIN COLLECTION OF CITY TAX.]

1. *Offer to do equity*.—A tax-payor, seeking to enjoin the collection of a tax imposed by a municipal corporation, can not obtain equitable relief on account of an excess of taxes, unless he offers in his bill to pay the amount admitted to be justly due.
2. *State taxation of imports*.—A person who purchases goods from an importer, after they have been brought within the boundaries and jurisdiction of the United States, but before they have been delivered at the port of entry, and before duties have been paid on them, and who then transports them, at his own expense, to the port to which they were consigned, is not an importer, and is not entitled to be subrogated to the rights and immunities of his vendor: but the goods, or the proceeds of their sale, are subject in his hands to taxation by State authority, although he retains and sells them in the unbroken packages in which they were imported.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. N. W. COCKE.

Mayor and Aldermen of Mobile v. Waring.

THE bill in this case was filed, on the 26th June, 1866, by Moses Waring, against the corporate authorities of the city of Mobile, and the city tax-collector; and sought to enjoin the collection of a tax, assessed under an ordinance of said municipal corporation, of fifty cents on each hundred dollars gross proceeds of the sale of merchandise after the 1st January, 1866. The new charter of the city of Mobile was passed on the 2d February, 1866.—See Session Acts, 1855-6, p. 202. The 37th section of the charter is in these words: "That the said mayor, aldermen and common council shall have power to lay taxes on the real and personal estate, auction sales, and sales of merchandise, capital employed in business, and income within said city, and a head tax upon all the male inhabitants over the age of twenty-one and under sixty; that the said tax upon the personal and real estate be laid in pursuance of an assessment and valuation of the said personal and real estate, to be made by some discreet person thereto appointed as assessor by the said corporation, which tax shall be laid in the manner following: The said assessment or valuation, when completed, containing all the property as well as the names of the owners thereof, shall be lodged with the clerk of the corporation, and the mayor, aldermen and common council shall assess so many cents on the dollar, making no distinction as to any persons, and which assessment or valuation, together with the names of the persons liable to taxation, with the tax laid thereon, shall be open for inspection to all and every person interested therein; and the said mayor, aldermen and common council shall give ten days' public notice in some newspaper printed within the limits of the city of Mobile, that the said assessment or valuation, together with the tax laid thereon, is ready for inspection; and if any person shall be dissatisfied with said assessment or valuation, or tax laid thereon, he shall give notice to the mayor, aldermen and common council to alter said assessment or valuation, together with the tax assessed thereon, as to them shall seem meet (witnesses shall be heard on oath to affix a proper valuation); but their decisions shall be final as to all questions or objections that may be brought before them in reference to the said assessment

or valuation, and the tax assessed thereon as aforesaid; and after twenty days have elapsed from giving the notice that the said valuation or assessment, together with the tax assessed thereon as aforesaid, are ready for public inspection, the said mayor shall issue his warrant annexed to the tax list to the collector of the corporation, containing a description of the real estate taxed, together with its valuation and the taxes assessed thereon, and also the amount of the personal property valued or assessed to each person, together with the tax assessed thereon, and the name of each person liable to a head tax, and the amount of such head tax laid; and provided that each person liable to pay the tax upon sales at auction and sales of merchandise shall, once in every three months, to-wit, on the first day of January, first day of April, first day of July, and first day of October, give in, under oath, the gross amount of sales of each three months, from the first day of October, 1865, and each three months thereafter, to the city tax-collector, whose duty it shall be to collect the tax so laid by the mayor, aldermen and common council; and upon the failure of any person to report such sales for the preceding quarter, then the mayor, aldermen and common council may provide and enforce such penalties as they may deem necessary for the enforcement and collection of such taxes; and provided further, that no tax shall be laid upon sales under judicial proceedings, guardians', executors', and administrators' sales, and sales of property under the provisions of deeds for the security or payment of debts; but it is expressly understood that the duties of the tax-collector for the collection of sales of merchandise shall in no wise relate to the sales of cotton." The municipal ordinance, under which the tax was assessed, was adopted on the 21st March, 1866; and an amendment of it was adopted on the 9th May following. One section of this ordinance required "all persons who have sold, or who may have been engaged in the sale of any merchandise, at private or auction sales," after the 1st January, 1866, to make quarterly returns, under oath, to the city tax-collector, "of the gross amount of their sales of merchandise and auction sales"; and provided, that any person who failed or refused to make such returns,

within ten days after public notice by the tax-collector, should be fined by the mayor. The complainant refused to make returns of his sales, on the ground that he was not liable to the tax, and was twice fined by the mayor for his refusal; and the judgment of the mayor was affirmed, on appeal, by the city council.

The allegations of the bill, as to the nature of the complainant's business, on which he based his claim of exemption from liability to the tax, were in these words: "Your orator further shows, that on, before, and since said 1st January, 1866, he has carried on in Mobile the business of selling salt, the product of countries foreign to the United States and to the State of Alabama. His said business has been confined to the sale of said salt to traders, or dealers, in the original packages, as the same were imported into the port of Mobile from such foreign countries. His said sales have not been to consumers, and have been in the unbroken original packages. These transactions comprise the only sales of merchandise made by him in the city of Mobile. His manner of business has been as follows: he purchases the said foreign salt, which is of English manufacture, and brought from the port of Liverpool, by the cargo, and from the foreign shippers thereof, either at sea, on the voyage of importation, or before the voyage of importation is completed, and before the hatches of the vessel, on which it is laden, are opened, or bulk broken, and before the cargo is entered at the custom-house for the payment of duties; he receives it from the vessel, on which it is brought from said foreign producing country, in the bay of Mobile, and before the same comes within the limits of the city of Mobile; and himself causes said merchandise to be brought into the city, and placed in store, for sale as aforesaid, and furnishes the money to pay the duties on it. In this mode and manner, all the business of your orator with regard to the receipt and sale of salt has been conducted by him since the 1st January, 1866. The gross sales thereof, from said date to the 1st April, 1866, have been forty thousand and thirty-three 61-100 dollars. Your orator charges, that his said business is not subject to the tax sought to be imposed on it by the said mayor, aldermen, and common

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council of the city of Mobile, and said tax is illegal and oppressive."

Separate answers were filed by the municipal authorities and the tax-collector. The material portions of the corporation's answer, in response to the allegations of the bill above quoted, were as follows: "Respondents admit, that complainant has carried on the business of selling salt in the city of Mobile since the 1st January, 1866; but they do not know, and therefore do not admit, that said salt is altogether the product of countries foreign to the United States and the State of Alabama; or that his business has been confined to the sale of said salt to traders or dealers, in the original packages, as the same were imported into the port of Mobile from foreign countries; or that his said sales have not been to consumers, and have been in the unbroken original packages; or that these transactions comprise the only sales of merchandise made by him in the city of Mobile; and so far as the said statements or allegations may be material, or may affect the rights and interests of these respondents, they require strict proof of the same. Respondents know nothing, of their own knowledge, of complainant's manner of business, as alleged in his bill; and they require strict proof of the same. They deny that complainant purchases said salt at sea, or [on] the voyage of importation, or before the voyage of importation is completed; but, on the contrary, they are informed, and believe, and state, that he purchases said salt, brought from the port of Liverpool, of the foreign shippers or consignees thereof, after the ship or ships on which it is laden arrive within the port or harbor of Mobile, with the intention of unlading the same. These respondents have caused inquiry and examination to be made in the records of the custom-house in Mobile, and state, that the entry of said salt at the said custom-house, for the payment of duties, is not made by the complainant, but by the consignees thereof; and that the consignees thereof pay the duties thereon, and are the persons who are allowed a credit therefor in said custom-house; so that these respondents in fact deny that complainant is an importer of said salt, and that his said business and the gross amount of his sales of said salt are

not subject to the tax sought to be imposed thereon, and that said tax is illegal and oppressive." Each of the answers contained a demurrer to the bill, for want of equity, and because it did not show on its face that the complainant was the importer of the salt sold by him ; and several special grounds of demurrer were assigned, which require no particular notice.

Several depositions were taken by both parties, for the purpose of showing the character of the complainant's business, and the manner in which it was carried on ; but, as to the material facts, there was no conflict in the evidence. Geo. W. Owen, whose deposition was taken at the instance of the complainant, and whose testimony was corroborated by the other witnesses, thus stated the transactions of which he had personal knowledge : "I am engaged in the shipping and commission business in Mobile, and was so engaged in the years 1865 and 1866. Up to December 1, 1865, I was clerk and book-keeper for D. Wheeler & Co., and have been a partner in said firm since that date. So far as I know, complainant's chief business is that of a dealer in salt, and was in 1865 and 1866. I had commercial transactions with him during these years. My transactions with him related to salt. Our firm was acting, in these transactions with him, for foreign merchants. The salt purchased from us by him was the product of Great Britain, and was brought to Alabama in ships. In many instances, we are advised by the owners of a cargo of salt in England, of the shipment of such cargo to this port ; and we have thereupon, in some instances, when we thought it to the advantage of the owners, sold such cargo to the complainant, 'to arrive.' In other instances, vessels have arrived in the bay of Mobile, with salt for ballast, seeking a market, and, after remaining a short time, making inquiries, and ascertaining the probability of obtaining freight here, have determined to dispose of the salt, and unload ; and we, as consignees, have thereupon sold the cargoes of salt, in the original packages, to the complainant, on board the vessel in the bay of Mobile ; one condition being, that we are in no way liable or responsible for the salt after its delivery to the complainant's barge or lighter alongside the

vessel. In other instances, vessels, after arriving, seeking a market, and ballasted with salt, finding that they could not do well here in respect to freight, have left for other ports, without breaking bulk, or unloading any portion of the salt. In our sales of salt to the complainant, within the last two years, we have acted solely as the agents of the foreign owners, and accounted to them for the proceeds, which we usually applied to the disbursements of the vessel. The salt is delivered to Waring, from the ship, in the bay of Mobile, about thirty miles below the city; and he assumes all the risks and expenses in reference to it, upon such delivery. It is delivered to him by the captain, or chief officer of the ship, after having been advised by us of the sale to him. When delivered, as aforesaid, the salt is brought to the city in barges, or sail lighters, at the expense, risk, and direction of the purchaser. The purchase invariably embraces the whole cargo of salt. The sale is sometimes made before, and sometimes after the arrival of the ship in the bay of Mobile. The cargo is always still on board at the time of the sale, and before bulk is broken; but whether before or after the hatches are taken off, I can not say. I presume there is no particular time for taking off the hatches, as I understand these to be merely kept on during the voyage to preserve the cargo. The sale is always made before the cargo is entered at the custom-house for the payment of duties. No vessel, from which we have ever sold complainant a cargo of salt, has ever come nearer to the city of Mobile than the anchorage in the lower bay. The manner of our sales to complainant has been as follows: we sell him the salt, deliverable in the bay, alongside the ship, he assuming the risk and expense of its transportation to the city, and from the moment of its reception on board the barge or lighter. In many instances, when we have not had sufficient idle funds on hand to pay the duties on the salt, we have called upon him for an advance of the purchase-money. In other instances, we have paid the duties, without having recourse to him; but, in either case, the amount of duties so paid is charged in the sales. The duty to be paid is ascertained by weight, (being about twenty-four cents in gold per hundred pounds,)

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and the weighing is done by a custom-house officer, after the landing of the salt on the wharf in Mobile, and always after the contract of sale with the complainant. We are sometimes advised of the shipment of the salt by the owners in the foreign port, and at other times we have no advices or information as to the shipment until the arrival of the ship in the bay of Mobile. When we sell 'to arrive,' the salt is the property of Mr. Waring upon its arrival in the bay of Mobile; and in other cases, it is the property of the foreign shippers. At the time of the unlading, so far as our sales to him since the close of the war are concerned, it has been his property at the time of unlading. The sale has always been made before the entry of the salt for the payment of duties, and the salt became his property. It is always taken and brought to the city at his risk."

The chancellor overruled the demurrer, and, on final hearing on pleadings and proof, rendered a decree for the complainant, perpetually enjoining the collection of the tax as against him; and his decree is now assigned as error.

R. H. SMITH, W. BOYLES, and THOS. H. HERNDON, for the appellants, made the following (with other) points: 1. The bill shows no ground for an injunction.—*Burnett v. Craig*, 30 Ala. 139; 19 Eng. L. & Eq. 639, and cases there cited; 35 Penn. St. R. 95; 38 Penn. St. R. 102; 23 Conn. 609; 8 Gill, 433; 24 Missouri, 273; 1 Halst. Ch. 410; Hill on Injunctions, 15; 1 Barbour, 219; 7 Paige, 60; 26 Barbour, 303; 15 Barbour, 375; 6 Johns. Ch. 28; 4 Johns. Ch. 352; 25 Conn. 232.

3. Neither the averments of the bill, nor the facts established by the evidence, show that the complainant is an *importer* of the salt sold by him. He does not bring the salt into the country; he does not make the entry at the custom-house; he does not pay the duties, except indirectly, and in the same sense in which every purchaser and consumer pays them; he does not pay the freight; and his purchase is not complete, until after the vessel has arrived at her port of destination, and not then until the salt is actually delivered to him. These facts, tested by the law, show that he is not an importer.—1 Gallison, 209, 239, 245,

365; 3 Peters, 304; 1 Mason, 499-503; 5 Cranch, 368; 9 Cranch, 104; 1 Peters, C. C. 256. In the mercantile sense of the words, the bay of Mobile is the city of Mobile; and that is the sense in which the words must be understood.—1 Arnould on Insurance, 77; 2 Taunton, 405, 408; 3 B. & Ald. 460; 4 Ald. & El. 211. This, too, is the uniform construction of the treasury department of the United States, as the proof shows.—5 Cranch, 372.

3. Not being the importer, the complainant can not claim exemption from State taxation, on the ground that he has already paid the United States for the privilege of selling. The importer paid the government for this privilege, and exercised the privilege in the sale to the complainant; and in the hands of the purchaser, whether retained or sold by him, the goods lost the character of imports, within the meaning of the Federal constitution, and became liable, like other property, to State taxation.—*Brown v. State of Maryland*, 12 Wheaton, 439-43; *Passenger Cases*, 7 How. 491; *License Cases*, 5 How. 575, 587, 589; 14 Georgia, 438.

4. Even if the imported goods, in the hands of the purchaser, were not subject to taxation under State authority, the exemption could not be extended to the proceeds of sales. There must be a limit to the restriction on State authority; and if the proceeds of sale in the hands of the purchaser are exempt, because they arise from the imports, the immunity could as well be claimed for any property whatsoever, in which those proceeds might be invested. Authorities last above cited.

P. HAMILTON, *contra*.—1. The equity of the bill is maintainable on several distinct grounds. It seeks to enjoin the collection of an illegal tax, to prevent a multiplicity of suits, and to prevent an injurious act by a public officer, for which the law might give no adequate redress. The right to an injunction, under the facts of the case, is shown by the following authorities: *Carroll v. Safford*, 3 Howard, 441; *Ottawa v. Walker*, 21 Ill. 605; 15 Ill. 202; 20 Ill. 327; 38 Penn. St. 309; *Mott v. Penn. Railroad Co.*, 30 Penn. St. 9; *Dodge v. Wolsey*, 18 Howard, 331; *Calbertson v. Cincinnati*, 6 Ohio, 579; *Burnett v. Cincinnati*, 3 Ohio, 73; *Morris Canal and*

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Banking Company v. Jersey City, 1 Beasley's Ch. 252; *Sheldon v. Buskirk*, 2 Comstock, 475; 7 Barbour, 132; 3 Sandford, 407.

2. Is the municipal tax, in its application to the complainant, illegal? The constitution of the United States declares, that no State shall, without the consent of congress, "lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." This constitutional provision, it will be observed, exempts imports, and not importers, from State taxation. It looks, not to the ownership, but to the subject of the commerce. Its object was, to give congress the entire regulation of all that pertains to the foreign commerce of the country, and the exclusive power of imposing duties on imports, except in the matter relative to inspection laws. Imports are the articles themselves which are brought into the country; and a duty on imports is not merely a duty on the act of importation, but a duty on the thing imported. When the thing imported has become incorporated and mixed up with the mass of property in the country, and not until then, it loses its distinctive character as an import, and becomes subject to the taxing power of the State. Congress has the exclusive power of declaring what commerce shall be carried on with foreign nations, what products of those nations shall be introduced here, and under what restrictions.—*Brown v. Maryland*, 12 Wheaton. The exemption from taxation is for the thing imported, and continues until that thing has come within the jurisdiction and control of the State; and no change in the form of the tax can evade or infringe the exemption, whether it be attempted in the form of a tax on the occupation, or on the person, or on the bill of lading.—*Passenger Cases*, 7 Howard; *Almy v. California*, 24 Howard.

The complainant comes within the protection of the constitutional provision, as construed and explained in the adjudications of the supreme court of the United States. His purchases are made in the original packages, before the completion of the voyage of importation, and before the goods are entered at the custom-house; he pays the duties, or advances the money to pay them; and he sells

the goods in the original packages. While in his hands, they are merely *in transitu*, and have not become mingled with the great mass of property in the State; and their character is not changed, until they have passed from his hands. While in the bay of Mobile, the vessel and its cargo are entirely under the control of the United States, whose officers board the vessel, obtain information of the cargo, report its character and condition to the custom-house, grant permits for landing the goods, and collect the duties; and the regulations of the custom-house, as to the name in which the goods are entered, are intended simply to facilitate the transaction of its business, and have a responsible party with whom its officers can deal. Having paid the duty levied by the United States, the complainant acquires the right to sell, without restriction or taxation by State authority. "The object of importation is sale. It constitutes the motive for paying duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it."—12 Wheaton, 461. Nor can the proceeds of sales, in the hands of the complainant, be subjected to a State tax; for that would be doing indirectly what can not be done directly. A tax in the form of a license on the business of importing, is a tax on imports. "Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to congress to regulate commerce; since an essential part of that regulation, and the principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation."—12 Wheaton, 448.

3. Another objection to the tax is, that it is claimed for a long period prior to the passage of the ordinance, and even before the adoption of the city charter under which that ordinance was passed. That portion of the ordinance which affixes a penalty for not making returns of sales made before its adoption, is an *ex-post-facto* law, and therefore illegal and void.

BYRD, J.—1. The counsel for the appellee insists, that the city authorities are claiming the right to assess against and collect from him taxes, for a greater period than that authorized by law. However this may be, it is apparent, if the city has any right to assess and collect the tax claimed, it has a clear right to do so for a part of the period, if not for the whole; and as the appellee refused to account at all, and did not offer in his bill to account for any part of that period, he is not entitled to maintain his bill on the ground that the city claimed more than it had a right to demand. The familiar maxim, that he who seeks equity, must do (or offer to do) equity, applies with full force to the case made by the bill. And this brings us to the consideration of the main point involved in the decision of this cause.

2. The authority of the State to confer the power of taxation upon a municipal corporation, is not questioned by counsel; nor do they question the constitutionality of the act under which the municipal authorities of Mobile were proceeding to assess the tax. The point made by the counsel for the appellee, as we understand it, is, that the act in question did not authorize the assessment and collection of taxes on the amount of sales of the salt bought and sold by the appellee, under the facts and circumstances shown by the evidence in this cause; or, if it did, that then the act, *to that extent*, is unconstitutional. Without intending to intimate an opinion, we remark, that we are not aware of any principle of law, or constitutional provision, which would inhibit the State legislature from authorizing by law the assessment and collection of taxes upon sales of merchandise sold previous to the passage of the law; and if the ordinance went beyond the authority conferred by the act, to that extent it would be null and void. In our opinion, the act, and the ordinance adopted, have a constitutional field of operation, and are, therefore, valid.

It appears from the evidence, that appellee purchased the salt in the years 1865–6, from the consignees at Mobile; some was contracted to be purchased after it left Europe, and before its arrival in the bay of Mobile; and a part was purchased after it arrived in that bay, and before it was

entered at the custom-house of the port of Mobile. Without stating all the facts proved by the testimony, we are satisfied that the appellee was not the importer of the salt, within any legal or commercial meaning of that term. He bought from the importer, or his consignee. A person who purchases goods from an importer, after they have been brought within the boundaries and jurisdiction of the United States, but before he pays duty on them, or they are delivered at the port of entry, and who then transports them at his own expense, from the place where they were when bought, to the port to which they were consigned, can not be held to be an importer.

But the question arises, whether, under such circumstances, and those in proof, the purchaser of an import is subrogated to the rights and immunities of the importer; or whether the import, in the hands of such a purchaser, is liable to State taxation, so long as it remains in unbroken packages in the hands of such purchaser. If not, then the appellee had the right to retain and sell the salt, in unbroken packages, free from State taxation. But, whether he or the importer could be taxed on the money arising from the sales thereof, we will not consider, as this case can be disposed of without touching that question.—See opinion of Taney, C. J., in *License Cases*. 5 Howard.

These, and kindred questions, have frequently come under the consideration of the supreme court of the United States; and it is to be regretted that the members of that supreme tribunal have so often disagreed upon those questions, and have still left some of them in great perplexity, if not obscurity. Without attempting the fruitless task of reviewing and reconciling those adjudications, we will content ourselves with a reference to those collated upon the briefs of the counsel in this cause, and with a few quotations from such as we prefer to follow, upon the question before us.

In the *License Cases*, (5 Howard, 574,) Taney, C. J., in his opinion, speaking of the question decided in the case of *Brown v. Maryland*, (12 Wheaton,) says: "When the commodity had passed from his" (importer's) "hands, into the hands of the purchaser, it ceased to be an import, or a

part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State, like any other property." This rule the chief-justice approved and adopted ; and I do not remember any case, in which its correctness has ever been judicially questioned. McLean, J., in his opinion in the same cases, says : " Under the decision of *Brown v. Maryland*, it is admitted that the license acts can not operate upon the right of the importer to sell. But, after the import shall have passed out of the hands of the importer, whether it remains in the original package or cask, or be broken up, it becomes mingled with other property in the State, and is subject to its laws." This rule was not questioned by any of the learned judges who delivered opinions in those vexed cases.

To entitle an import to exemption from State taxation, it must be in the hands or control of the importer, or his agent, in unbroken packages, or in the condition imported. If he breaks up the packages, and offers the contents for sale, they become liable, *even* in his hands, to State taxation. If he sells them in unbroken packages, under the authority of the *License Cases* and *Brown v. Maryland*, they are liable to State taxation in the hands of the purchaser. The appellee not being the importer of the salt sold by him, it was liable to State taxation ; and *a fortiori*, the proceeds of the sale thereof were liable.

It is unnecessary, under this view of the merits of the cause *upon the proof*, to consider the grounds of demurrer assigned against the equity of the bill, or the other questions argued so ably at the bar, and on printed arguments furnished the court by counsel.

From the view we take of this cause, the decree of the chancellor must be reversed, and a decree must be here rendered, dismissing the bill, at the costs of the appellee, in this, and in the court below.

CARLETON & SLADE *vs.* GOODWIN'S EXECUTOR.

[MOTION FOR AFFIRMANCE OF JUDGMENT ON CERTIFICATE.]

1. *Discontinuance of appeal, by failure to file transcript.*—By the settled practice of this court, an appeal or writ of error is discontinued, and becomes *functus officio*, unless the transcript is filed at the return term, or unless the cause is placed on the docket by an appropriate order; and this by operation of law, without any action on the part of the court, or any motion on the part of the appellee.
2. *Affirmance on certificate.*—Under the Code, (§ 3031,) unlike the practice under the former statute, (Clay's Digest, 308, § 13,) an affirmance of a judgment on certificate, on account of the failure to file the transcript at the return term of the appeal or writ of error, can only be had at the return term.
3. *Constitutionality of act of Feb. 18, 1867, to prevent discontinuance of undecided appeals.*—The act approved February 18, 1867, entitled "An act to prevent undecided appeals to the supreme court from losing their force, by discontinuance or otherwise, unless the *appellant* move for a discontinuance after legal cause therefor has occurred," (Session Acts, 1866-67, p. 547,) so far as it operates on appeals which had been discontinued by operation of law at the time of its passage, is an attempt by the legislature to exercise judicial power, and is, therefore, unconstitutional and void.

APPEAL from the Circuit Court of Clarke.

MOTION for an affirmance of a judgment on certificate. All the facts of the case are stated in the opinion of the court.

RICE, SEMPLE & GOLDTHWAITE, for the motion.

No counsel opposed the motion.

A. J. WALKER, C. J.—Carleton & Slade produced to this court, at its January term, 1867, a certificate, and asked an affirmance upon the certificate. The certificate was given by the clerk of the circuit court of Clarke county, on the 30th August, 1866. It states, that a judgment was rendered in such circuit court, on the 17th March, 1863, in

favor of Carleton & Slade, against Norphlet Goodwin, for \$121.90, and costs ; and that an appeal was taken, on the 30th December, 1863, to the June term of this court, 1864. The appellant did not file his transcript at the return term of the appeal. On the 16th February, 1867, before the motion for an affirmance in this case was made, an act was approved, in the words following: "No undecided appeal to the supreme court, heretofore taken, or hereafter taken, shall be deemed or treated as discontinued, or as having lost its force, unless the *appellant* shall duly move for a discontinuance, after legal cause of discontinuance has occurred."—Session Acts, 1866-67, p. 547.

[1.] By an uniform chain of decisions under the Code and under the law which preceded it, an appeal or writ of error to this court is discontinued, and *functus officio*, unless the transcript is filed at the return term, or unless by an appropriate order the case is placed on the docket.—*United States v. Hayden*, 5 Porter, 533 ; *Hayden v. United States*, 4 Porter, 393 ; *Roebuck v. Dupuy*, 2 Ala. 352 ; *Tardy v. Murray & Durand*, 17 Ala. 582 ; *Perryman v. Camp*, 24 Ala. 438 ; *Cooper v. Maclin*, 25 Ala. 298 ; *Owen v. Echols*, 28 Ala. 689. These decisions clearly establish the proposition, that an appeal is discontinued by a failure to file the transcript at the term to which it is taken, without any action on the part of the court, or any motion for a discontinuance. The proposition is both involved and illustrated in the cases in which it is held, that an appellant, failing to file the transcript at the term to which the appeal was taken, may sue out a second appeal, unless there has been, in the meantime, an affirmance upon certificate. A second appeal could not be legally sued out, unless the former was, in contemplation of law, terminated. Therefore, in contemplation of law, the mere failure to file a transcript at the return term, in the absence of an affirmance on certificate, *ipso facto* disposes of and destroys an appeal. It requires no formal discontinuance in court, or order of court, to consummate the death or discontinuance. The decision of the supreme court of the United States is very emphatic on the same subject. A writ of error was not filed at the proper term ; and the court said : "The writ has become a nullity, be-

cause it was not returned at the proper time."—*Blair v. Miller*, 4 Dallas, 21.

[2] The statute of this State, existing before the adoption of the Code, expressly directed the allowance of an affirmance on certificate, at the return term, or "at any term thereafter."—Aikin's Digest, 256, § 13; Clay's Digest, 308, § 13. Under this statutory authority, it might well be held, that the cause remained *in fieri* to a subsequent term, for the purpose of an affirmance on certificate, notwithstanding the transcript was not filed at the proper term; and it was, we suppose, the practice to allow affirmances on certificate at a subsequent term, unless in the meantime a second writ of error was sued out. But that law was repealed by the Code, and the direction for the allowance of affirmance on certificate at a subsequent term was omitted. This omission is in itself significant of an intention to change the law in that respect.

There is another change of the law made by the Code, also significant of a purpose to restrict the affirmance upon certificate to the term to which the appeal might be taken. The section of the old law authorizing the affirmance upon certificate concludes with a provision, that "the cause may be reinstated on the docket, at any time during the term *to which the writ may be returnable*, upon showing sufficient cause to the supreme court." The new law, (Code, § 3031,) after authorizing an affirmance on certificate, declares that, "for good cause shown, the court may reinstate the cause, *during the term*, on payment of costs." The necessity of restricting the reinstatement of the case to the return term, under the old law, was produced by the allowance of an affirmance at a subsequent term. Under the new law, there is no such restriction; but there is an obvious implication, that whenever affirmance is had on certificate, a reinstatement of the cause may be had during the term; and upon the supposition that no affirmance can be had after the first term, there was no necessity for the restriction of the old law, as to the time when the cause might be reinstated. No reason for the confining of the reinstatement of the case to the first term can be deduced from section 3031 of the Code, which does not apply as well to the affirmance on

certificate. We are informed that the practice, for the last several years, and since the Code was adopted, has been to refuse an affirmance on certificate after the term to which the appeal is taken.

[3.] The cause on appeal being discontinued—having ceased to be—after the first term, an affirmance on certificate could not be had, because there is no case pending; there is nothing to give jurisdiction over the case, and there is no notice to the parties. It being a matter of legal decision, that the cause was discontinued, and in the contemplation of law the cause having been discontinued for several years, although no motion was made for discontinuance, is it competent for the legislature to declare that there is no discontinuance, that the judgment of the law was wrong, and that the case was still *sub judice*? The question has, indeed, a still wider range; for, if the act of the legislature can effect the restoration of appeals legally discontinued, for the purpose of allowing affirmances, so also must it effect the restoration of discontinued appeals so as to allow the appellant to file his transcript, and thus restore all the discontinued appeals of the past, unless the cases have terminated in an affirmance on certificate. If the act of the legislature operates upon antecedent discontinuances, an appeal taken nine years ago would be restored; for, if the appeal was taken within the period prescribed by the statute of limitations, the lapse of time would have no effect upon the restorative powers of the statute.

By the third article of the constitution of this State, the legislature is prohibited from the exercise of judicial power. The transcript in this case not having been filed at the June term, 1864, the law, as applicable to the case, declared that the cause on appeal was ended, without a motion for a discontinuance. The determination of this question was the office of a court. The legislature, in assuming to decide the question, exercised a judicial power; for the decision whether a cause is discontinued or not, must, of necessity, belong to the courts. An eminent writer thus defines the distinction between a judicial and a legislative act: "That which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law

is in relation to some particular thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions."—Sedgwick on Statutory and Constitutional Law, 167. This definition may not be critically accurate; but it is difficult to conceive of any definition of judicial power, which would not include authority to determine whether a cause has not been by the transactions of the past discontinued. In so far as the legislature has prescribed a rule of discontinuance for the government of future cases, the statute involves the exercise of legislative power; but, in so far as it assumes to determine upon, and declare the effect of a given fact upon, causes in the past, it is a mere assumption of judicial authority, and the law must be treated as void to that extent.

The judgment of the law, that this case was discontinued some years ago, would be reversed by the legislature, if the act in question were allowed the operation desired. It involves the assumption of power to define the *status* of cases in court, to hear and decide questions of law involved in adversary suits, and to control the judicial judgment in its application of legal principles to cases. Such a power is certainly an invasion of the province of the judiciary, and can not be exercised consistently with the constitution. The legislature can not perform an act between parties in a pending suit, and decide of it.—*Taylor v. Place*, 4 Rh. I. 324; *Merrill v. Sherburne*, 1 N. H. 199; *Lewis v. Webb*, 3 Greenl. 326; *Dunham v. Lewiston*, 4 Greenl. 140; *Bates v. Kimball*, 2 Chip. 77. Nor can the legislature prescribe to the court what judgment it shall render in any case.—*Holden v. James*, 11 Mass. 396.

Our decision, made at the last term, that an act extending the period of limitation, so as to allow an appeal already barred by the statute of limitations, is defensible upon the ground, that such an act decided no question of a case, and adjudged no question of right in a case, but merely removed a barrier prescribed by the legislature itself, affecting the remedy, to the trial of a case. It was held, that the period of limitation could not be extended after the completion of a bar, when the title to property would be

affected.—*Page and Wife v. Matthews*, 40 Ala. Our decision on that subject is, we think, correct, but very near the boundary of the area of legislative power, and can scarcely be a precedent for legislation beyond it in the same direction.
Motion denied.

FOSTER vs. CHAMBERLAIN & CO.

[DETINUE FOR SCHOONER FLAT-BOAT.]

1. *Abatement and revivor of action*.—Under section 2146 of the Code, as under former statutes, if one of two defendants in detinue dies pending the suit, the action can not be revived, at the instance of his personal representative and the surviving defendant, so as to proceed against them jointly.
2. *Proof of outstanding title by defendant*.—Where the plaintiff in detinue, never having had actual possession, is driven to proof of his title to sustain the action, the defendant may defeat a recovery by proof of a superior outstanding title in a third person, without connecting himself with it.
3. *Registration of mortgage on vessel*.—Under the act of congress approved July 19, 1850, (Brightly's Digest, 833, § 44,) a mortgage of any vessel of the United States, to be valid against subsequent purchasers without notice from the mortgagor, must be recorded in the custom-house where such vessel is registered or enrolled; and a registration in the office of the probate judge of the county is neither actual nor constructive notice.
4. *Relevancy of evidence on question of damages*.—The fact that the plaintiff in detinue, having obtained the possession of the property in controversy by executing the statutory bond, (Code, § 2192,) afterwards sold the property under the mortgage which was the foundation of his title, and that the defendant became the purchaser at the sale, and received the property under his purchase, is not competent evidence for the plaintiff, under the plea of the general issue, for the purpose of mitigating the defendant's damages.
5. *When action lies*.—The plaintiff can not recover in detinue, when the general issue is pleaded, without proving that the defendant had possession of the property at the commencement of the suit, or showing facts which bring the case within the exceptions to the general rule as to possession; and in the absence of such proof by the plaintiff, it is error to instruct the jury that, "under the pleadings in the case, a possession by the defendant would be implied."

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Chamberlain & Co., against Herman Parker and Phineas O. Foster, to recover "a certain schooner flat-boat, named and called *The California*," together with damages for its detention; and was commenced on the 27th August, 1861. On the trial, as the bill of exceptions states, "when the evidence was closed, the court inquired, before charging the jury, what were the pleas in the case. The reply was, the general issue; but this plea, it appeared, had not been reduced to writing. The defendant's counsel then proposed, with the leave of the court, to enter written pleas of the general issue and *non detinet*; but the court declined to admit the plea of *non detinet* at this stage of the proceedings, and said that, if that plea were relied on, it should have been specially pleaded, and that the verbal plea of the general issue could only be construed as a denial of the plaintiffs' cause of action."

On the 23d April, 1866, an entry was made in the cause, in these words: "The death of the defendant Parker suggested, and the plaintiffs suffer the suit to abate as to him." On a subsequent day of the term, Mrs. Jane Parker, the administratrix of said Herman Parker, moved the court that she might be made a party defendant to the suit, in the place of her intestate, and be permitted to defend with said Foster; and said Foster joined in the application. The plaintiffs resisted this motion, and the court refused it; to which ruling and decision exceptions were reserved by said administratrix and said Foster separately. At a subsequent time, during the trial, the court having refused to allow the defendant Foster to adduce evidence of an outstanding title to the vessel in the estate of said Herman Parker, the motion to admit said administratrix as a party defendant was renewed, and was again refused by the court.

It was proved on the trial, as the bill of exceptions further shows, that the vessel in controversy was built and owned by one James W. Burroughs, in 1858; was engaged in the coasting trade between Mobile and New Orleans,

regularly licensed under the laws of the United States, and duly enrolled in the custom-house in Mobile. "There was no evidence tending to show that the plaintiffs had ever been in the possession of said schooner, prior to the commencement of this suit." To prove title in themselves, the plaintiffs offered in evidence a mortgage on the vessel, executed by said James W. Burroughs, dated the 15th day of February, 1858, and conveying the vessel to them as a security for the payment of twelve hundred dollars. The law-day of this mortgage was the 1st day of March, 1859; and the deed contained a power of sale, in the event of the non-payment of the debt at maturity. The mortgage purported to have been recorded in the office of the probate judge of Mobile county; but the date of its admission to record was not shown, nor was it shown to have been registered in the custom-house at Mobile. The defendant objected to the admission of the mortgage as evidence, "on the ground that it was not sufficiently proved." The court overruled the objection, and allowed the deed to go to the jury as evidence; and the defendant excepted.

For the purpose of showing an outstanding title, superior to that of the plaintiffs, the defendant offered in evidence a mortgage on the vessel, executed by said Burroughs, dated the 15th May, 1859, and conveying said vessel to said Herman Parker, under the name and style of H. Parker & Co., to secure the payment of a certain debt therein recited to be due and owing by said Burroughs to said Parker. He also offered to prove the consideration of said mortgage, as therein recited, and its due registration at the custom-house in Mobile; also, a transcript from the records of one of the district courts in New Orleans, duly certified under the acts of congress, which showed a judgment against said Burroughs, in favor of H. Parker & Co., a sale of the schooner by the sheriff under execution on that judgment, and the sheriff's deed to said Parker as the purchaser. This judgment purported to have been rendered on the 11th day of January, 1860, and the sheriff's deed was dated the 18th January, 1860. On motion of the plaintiffs, "the court excluded all and every part of this evidence, on the grounds—1st, that it was irrelevant;

and, 2d, that it was not competent for the defendant, in this action, to show title to the schooner in any body but himself, unless he also showed that he was in some way connected with that title." To this ruling of the court an exception was reserved by the defendant.

At the commencement of the suit, the plaintiffs having made affidavit of ownership, and given bond as required by the statute, the sheriff took the schooner into his possession; and on the failure of the defendants to replevy within the time allowed by law, and the execution of the necessary replevin bond by the plaintiffs, he delivered the vessel to the plaintiffs. On the trial, after the defendant had adduced evidence of the value of the vessel, and of its use from the time it went into the plaintiffs' possession, "the plaintiffs offered, for the purpose of showing that no claim for damages, for the use or hire of the vessel after the 14th October, 1861, could be made against them, to introduce evidence to show that, on said 14th October, 1861, said schooner was sold under the power of sale contained in their said mortgage, and that said defendant Foster became the purchaser at said sale, and went into the possession of said vessel." The defendant objected to the admission of this evidence, "on the ground that it was irrelevant and immaterial," and reserved an exception to the overruling of his objection.

"The court charged the jury, among other things, that if Burroughs, the mortgagor, was the owner of the schooner at the time of his mortgage to the plaintiffs, then, on default of payment as therein provided, the plaintiffs acquired under the mortgage a right to the possession of the schooner, and could maintain an action of detinue for it, unless it was shown that there was a better title in the defendant, or in some third party, or a better right to the possession in the defendant. To this charge the defendant excepted.

"There was no evidence tending to show that either the defendant Foster, or the said Herman Parker, deceased, or both of them, were in the possession of the schooner at the time the suit was brought, or had ever been in possession previous to the bringing of the suit." The defendant asked the court to instruct the jury, "that the plaintiffs could not

recover in this action, unless they had shown that, at the commencement of the action, he was in possession of the schooner sued for." The court gave this charge, "but instructed the jury, at the same time, that, under the pleadings in the case, a possession by the defendant would be implied"; to which qualification of the charge the defendant excepted.

All the rulings of the court, to which, as above stated, exceptions were reserved by the defendant, are now assigned as error.

P. HAMILTON, for appellant.—1. The court erred in refusing to permit the personal representative of Parker to be joined as a defendant.—Code, § 2146. The suit was brought against Parker and Foster, not as co-partners, but as part owners, and as jointly liable in their individual characters to the plaintiffs. On the death of Parker, his right and title, whatever it was, passed to his personal representative, and did not survive to Foster; and the personal representative should have been allowed an opportunity to litigate the title, and to establish the right of his intestate. The case does not fall within the principles established in *Rupert & Cassity v. Elston's Executor*, (35 Ala. 79,) and the cases therein cited; all of which were actions on money demands, which are made joint and several by statute. Detinue is a peculiar remedy, involving both the title to property and damages for its detention; and this in favor of the defendant, as well as of the plaintiff. The property is in the possession of the law, for the benefit of the successful party; and he is entitled to recover damages for its detention, if the other party has had the possession. In this case, the plaintiffs gave the statutory bond, and acquired the possession; and if the suit was suffered to abate as to the deceased defendant, his estate loses the benefit of the security afforded by the plaintiff's bond.—Code, § 2194. The plaintiff can not recover in the action, unless he has the entire legal title.—*Price v. Talley's Adm'rs*, 18 Ala. 21. The statutory rule as to the revivor of actions is the same, whether the deceased party were a plaintiff or a defendant. If he were a plaintiff, the survivor could not recover, with-

out joining his personal representative; and the same rule must govern in the case of a deceased defendant. The action of ejectment affords the closest analogy to the action of detinue, in this respect.—23 Ala. 192, 393.

2. The court erred, also, in excluding the evidence offered to show a superior outstanding title in Parker, or his personal representative. As the plaintiffs had never had the actual possession before the commencement of the action, they could only recover on proof their title; and the defendant might defeat a recovery by showing a superior outstanding title in a third person, without connecting himself with it.—*Miller v. Jones' Adm'r*, 26 Ala. 247; *S. C.*, 29 Ala. 174; *Gardner v. Boothe*, 31 Ala. 286; *Reese v. Harris*, 27 Ala. 301; 12 Ala. 823.

3. The court erred, also, in the qualification added to the charge requested by the defendant.—*Parsons v. Boyd*, 20 Ala. 117; *Walker v. Fenner*, 20 Ala. 192; *Fenner v. Kirkman*, 26 Ala. 650; 1 Saunders' Pl. & Ev. 962.

4. As Parker's mortgage was regularly recorded in the custom-house at Mobile, pursuant to the requirements of the act of congress, while that of the plaintiffs never was so recorded, Parker's was the superior title.—9 U. S. Statutes, 440; 1 Brightly's Digest, 138.

5. The court erred, also, in admitting evidence of the sale under the plaintiffs' mortgage, and the purchase at that sale by the defendant. The defendant paid the consideration of his purchase, and the plaintiffs received it; and such sale and purchase had no relevancy to the question of damages in this case. If the plaintiffs' act, in taking possession of the vessel under the proceedings in this suit, was wrongful, they could derive no benefit from their subsequent wrongful act in selling it.

JOHN HALL, *contra*.—1. Parker's personal representative had no right to make herself a party defendant, against the consent of the plaintiffs. If the plaintiffs chose to proceed against the surviving defendant, they had a right to do so, and the defendant certainly could not complain. *Rupert & Cassity v. Elston's Executor*, 35 Ala. 79; *Easley v. Boyd*, 12 Ala. 684.

2. In detinue, service of the writ is proof of the demand, under the plea of the general issue. If Foster wanted to save costs, he should have disclaimed title to the property on service of the writ.—*Vaughn v. Wood*, 5 Ala. 304; *Spencer v. McMillan*, 10 Ala. 583; *Dunn v. Davis*, 12 Ala. 135; 13 Ala. 370.

3. A deed of trust for the property is such title as will sustain the action of detinue.—*Magee v. Carpenter*, 4 Ala. 469; *Parsons v. Boyd*, 20 Ala. 112.

4. The defendant in detinue can not show an outstanding title in a third person, without connecting himself with it.—*McCurry v. Hooper*, 12 Ala. 823.

JUDGE, J.—1. In *Rupert & Cassity v. Elston's Executor*, (35 Ala. 79,) our statutes and previous decisions, relating to the abatement and revivor of actions, are reviewed. STONE, J., in delivering the opinion of the court in that case, said: "These statutes were construed at an early day; and it was held that, in cases where there were more plaintiffs or defendants than one, then the death of a part of the plaintiffs or defendants did not authorize the joining of the representative of a deceased party, as a co-plaintiff or co-defendant with the survivor or survivors. The proper rule, in such case, was said to be, to abate the suit as to the deceased party or parties, and permit the litigation, in case the cause of action survived, to proceed in the names of the surviving parties.—*Beebe & Brewer v. Miller*, Minor, 364; *Gayle v. Agee*, 4 Porter, 507; *Gregg v. Bethea*, 6 Porter, 9. The principle thus early settled has withstood the scrutiny of thirty-five years, and has never been departed from. We have no disposition to unsettle a principle which has been so long acquiesced in, and which has so frequently been the basis of judicial action in the courts of original jurisdiction."

It was contended by counsel in that case, that section 2146 of the Code, relating to the abatement and revivor of actions, had substantially departed from the former statutes on the same subject, and required the establishment of a different rule. But the court held otherwise, and declared that that section of the Code, being general in its terms,

must receive the same construction in every form of action which survives. We are satisfied with the exposition of the law as made in the case above cited; and it follows, that the court below did not err in refusing to permit the action as against Parker, to be revived against his personal representative.

The argument, that the refusal to permit the revivor deprives the administratrix of the security the law gives her in the statutory bond of the plaintiffs to re-deliver the property sued for, and pay damages for its detention, in case they fail in the action, seems to be predicated upon the idea, that none but a statutory judgment can be rendered on such a bond, in case of its forfeiture. The fact that, if no statutory judgment can be rendered in such case, the bond may nevertheless, if forfeited, be enforced as a common-law obligation, deprives this argument of its force. *Savage v. Gunter*, 32 Ala. 467.

2. The record informs us, that the plaintiffs had never been in the actual possession of the vessel sued for, previous to the commencement of the action. Their right to a recovery seems to have been based upon the title alone. A plaintiff in detinue, occupying such a position, must resort to proof of his title, in order to show his right of possession; (*Reese v. Harris*, 27 Ala. 301); and in every such case, the defendant may show a superior outstanding title in a third person, without connecting himself therewith, unless he is prevented from so doing by some matter or thing amounting in law to an *estoppel*; as in *Miller v. Jones' Adm'r*, 29 Ala. 174, and *Gardner v. Boothe*, 31 Ala. 186.

When the case of *Miller v. Jones*, above cited, was first before this court, GOLDTHWAITE, J., in delivering the opinion of the court, said: "It is certainly true, that in the action of detinue, the plaintiff may recover upon possession alone, against any one who has not as good a right to the possession as himself. He recovers on the right he has to have the thing delivered to him. Where the possession alone would entitle the plaintiff to a recovery, we do not see how the other party could defeat it by proving title in a stranger, unless he connected himself with it, thus proving that he had the better right. But, where the claim is

based, not upon possession, but on the title, there the claim may always be disproved by showing that the title is not in the plaintiff, but in another. Thus, if the plaintiff was to show that he was the owner at a period anterior to the suit, the defendant might well show that he had parted with the title before the commencement of the action, and thus defeat a recovery, not by showing any right in himself, but by proving that the other party did not occupy a position that would entitle him to recover.”—26 Ala. 247.

This exposition of the law meets with our approval, and is not in conflict with any of the previous or subsequent decisions of this court upon the same question.—*Sims v. Boynton*, 32 Ala. 353, and cases there cited; *Hall v. Chapman's Adm'rs*, 35 Ala. 553; *Gardner v. Boothe*, 31 Ala. 186; *Lucas v. Daniels*, 34 Ala. 188. It results, that the court below erred in ruling out the evidence offered by the defendant to establish a title to the property sued for in the administratrix of Parker.

3. The bill of exceptions does not purport to set out the whole of the evidence which related to the title of the plaintiffs; and therefore, we can not undertake to pronounce whether it was superior or inferior to the outstanding title proposed to be shown by the defendant. But, if, on another trial, the plaintiffs' title should be made to rest exclusively on the mortgage to them from Burroughs, and no *actual notice* of its existence should be shown to Parker prior to the accrual of Parker's title, then the title of the latter, as set out in the bill of exceptions, if real and *bona fide*, would, in law, be the superior title.

An act of congress of July 29, 1850, provides as follows: “No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person, other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the collector of the customs where such vessel is registered or enrolled: *Provided*, that the lien by bottomry on any vessel created during her voyage, by a loan of money or materials, necessary to repair or enable such vessel to prosecute

a voyage, shall not lose its priority, or be in any way affected by the provisions of this act.—9 U. S. Stat. 440 ; 1 Brightly's Digest, 833, § 44.

The provisions of the act of congress above quoted, it has been held, come within the power conferred by the constitution upon congress, to regulate commerce.—*Mitchell v. Steelman*, 8 California, 363, and cases there cited.

The mortgage of the plaintiffs was executed and acknowledged before a justice of the peace in Mobile county, and recorded in the office of the probate judge of said county, but no where else ; nor is the date of its admission to record shown. To defeat subsequent creditors and purchasers without "actual notice" of its existence, the act of congress, as we understand it, requires that it should have been recorded in the custom-house at Mobile, where it is shown the vessel had been registered. The alleged mortgage from Burroughs to Parker, though subsequent in date, is averred to have been thus recorded, which made the lien created by it perfect, and superior to the lien of the plaintiffs under the mortgage to them ; and in addition to this, it was proposed to be shown by the defendant, that Parker had acquired the absolute title to the vessel, by a purchase thereof at a sale under execution against Burroughs in the State of Louisiana.

4. In the admission of the evidence of the sale of the vessel by the plaintiffs, and its purchase by the defendant Foster, after the plaintiffs had acquired the possession thereof under the bond given by them in the action, the court erred. This evidence was wholly irrelevant, under the pleadings in the case, and illegal for the purpose for which it was admitted.

5. It appears from the record, that no pleas were filed in writing, but that the general issue only was considered as pleaded. The general issue in the action of detinue, is *non detinet*.—3 Chitty's Pl. 1023. This plea puts in issue the right of the plaintiff to recover. As was held by this court, in *Walker v. Fenner*, (20 Ala. 192,) to entitle a plaintiff in detinue to recover, he must show that the defendant, either at the time of the demand made, or, in the event there was no demand, at the time the writ was sued out, had the ac-

tual possession, or the controlling power over the property; unless, having the possession anterior to such demand or suit, he has wrongfully, or to elude the plaintiff's action, parted with it; or unless he holds it under a contract of bailment, the terms of which he violates by refusing to re-deliver it.—See, also, *McArthur v. Carrie's Adm'r*, 32 Ala. 75; *Fenner v. Kirkman*, 26 Ala. 650; *Harris v. Hillman*, 26 Ala. 980. Such being the well settled law, the circuit court erred in the qualification given to the charge requested by the defendant.

As what we have said will probably be decisive of the case on another trial, we deem it unnecessary to notice any other question presented by the record.

Judgment reversed, and cause remanded.

PULLIAM, WILLS, RANKIN & CO. vs. NEWBERRY'S ADMINISTRATOR.

[STATUTORY TRIAL OF RIGHT OF PROPERTY IN STOCK OF GOODS.]

1. *Admissibility of defendant's declarations, as evidence against claimant.* The conduct and declarations of the defendant in attachment, subsequent to the levy of the attachment and to the transfer to the claimant, and not accompanying or explaining any material fact in the case, are not competent evidence against the claimant.
2. *Admissibility of defendant's and claimant's declarations, as evidence for claimant.*—The declarations of the defendant in attachment and the claimant, made prior to the levy of the plaintiff's attachment, in the presence of a witness who was called in by them to take an account of the stock of goods in controversy, and tending to show a sale of the goods by the defendant to the claimant, are competent evidence for the claimant.
3. *Validity of conveyance on valuable consideration, with intent to defraud creditors.*—To sustain a sale or conveyance as against creditors of the grantor or vendor, it must not only be made on valuable consideration, but must also be *bona fide*: if there is an actual intent between the parties to hinder, delay, or defraud other creditors, the existence

of a just debt, or other valuable consideration, is not sufficient to uphold the transaction.

4. *Charge requiring explanation.*—An affirmative charge, which, though obscure, or tending to mislead the jury, asserts a correct legal proposition, is not a reversible error, since the appellant might have protected himself against it by asking an explanatory charge.
5. *Proof of plaintiff's debt.*—As between the plaintiff in attachment and a claimant under purchase from the defendant, the attachment itself is sufficient proof of the plaintiff's debt against the defendant.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. H. D. CLAYTON.

THIS was a statutory trial of the right of property in and to a stock of goods, on which an attachment had been levied, at the suit of the appellants, as the property of J. A. Newberry & Brother, and to which a claim had been interposed, under the statute, by Joseph C. Newberry, who was the father of the defendants in attachment; and the claimant having died pending the suit, it was revived in the name of his administrator. The trial was had at the September term, 1866, when the following bill of exceptions was reserved by the plaintiffs:

"On the trial of this cause, the plaintiffs proved, by W. H. Strickland, that he, as deputy-sheriff, executed the attachment, (which was shown to him,) by levying the same on a stock of goods in said county, in the possession of the defendants, on the 20th day of February, 1861; that he took possession of said goods, by locking up the store-house, which was occupied by the defendants, and taking the key away with him; that when he first entered the store, one of the defendants was engaged in selling goods to some customers; that he waited until the customers got through, and then mentioned his business, made the levy, and took possession of the goods, in the manner stated. Said witness further testified, that on the morning after said levy, the defendants in attachment, with three other parties, met him in the public road, and, making demonstrations of violence, demanded of him the key of the store-house; that one of said party had a double-barrelled gun, and others had sticks; that one of the party told him, that they had

come for the key of said store-house, and that he had better give it up, or they would have a fuss; that he refused to give up the key, though he felt apprehensive that, unless he did so, the party intended to do him some bodily harm. To this portion of the evidence, included in this paragraph, the claimant objected, and the court sustained the objection, and excluded the evidence; to which the plaintiffs excepted. The claimant admitted that the value of the goods was sufficient to satisfy the plaintiffs' demand. The plaintiffs here rested.

"The claimant then introduced one Hybert as a witness, who testified, that the defendants and the said claimant sent for him, in December, 1860, to take an account of the stock in trade then on hand, belonging to the defendants; that he did so, at their request, at New York prices,—the invoice of which was then produced, and proved by the witness. Said witness further testified to a conversation between the defendants and the said claimant at that time—that the stock was to be taken for the purpose of turning the same over to the claimant, to pay off and satisfy a debt due from the defendants to him; which debt was for one note for about one thousand dollars, on one Owens, and another note for twelve or thirteen hundred dollars, on another party, amounting in the aggregate to about twenty-three hundred dollars; which said notes were lent to the defendants, by the claimant, in 1859, to enable them to commence business, and which the defendants discounted for cash, for that purpose. The witness testified, that he knew nothing of said transaction, only from what he heard the defendants and the claimant say at the time. To this part of the evidence, so far as it details the conversation between the defendants and the claimant, the plaintiffs objected; but the court overruled their objection, and they excepted. Said witness further testified, that it was agreed between the defendants and the claimant, that the defendants should hold possession of the goods, and dispose of the same, as his clerks, until such time as they might be called off to the war, (which was then in anticipation,) and that the store-house, goods, &c., were then to be turned over to one Liptrot, as the agent of said claimant, who was

then, and had been for more than twelve months, a resident citizen of Texas. To this evidence the plaintiffs objected; which objection the court overruled, and the plaintiffs excepted. Said witness further testified, that the claimant was the father of the defendants; that it was known to every body that the defendants were in failing circumstances; that they sold to the claimant their entire estate, except two buggies, one horse, and a small country storehouse; that the amount of goods sold by them to him was twenty-seven hundred dollars, at New York prices, and they also transferred to him, besides said goods, over five hundred dollars in good solvent claims.

"This being all the evidence, the plaintiffs asked the court to charge the jury, that if the defendants in attachment were indebted to the claimant, and the purchase and sale between the parties was intended by all of them to hinder, or delay, or defraud other creditors, by securing the debt of the claimant as a preferred creditor, then the transaction is fraudulent and void. The court refused to give this charge, and the plaintiffs excepted.

"The claimant then asked the court to instruct the jury—1st, that if the claimant bought the goods from the defendants for a valuable consideration, then that would not be such a fraud as to vitiate the sale; 2d, that a debt is a sufficient consideration to sustain a sale of property; 3d, that the claimant had a right to secure his debt, if the defendants in attachment owed him any thing, although they owed other debts; 4th, that if the sons made an assignment of the bulk of their property, to pay the debt due their father, the transaction is not a fraud in the meaning of the statute; and, 5th, that if the sons owed their father, and the sale of the property was made, in good faith, to prefer the debt of their father, then that is not such a fraud as would vitiate the preference. The court gave each of these charges as asked, and the plaintiffs excepted to each separately."

The several rulings of the court to which, as above stated, exceptions were reserved by the plaintiffs, are now assigned as error.

Pulliam, Wills, Rankin & Co. v. Newberry's Adm'r.

WATTS & TROY, and GARDNER & WORTHY, for appellants.

1. The testimony of the deputy-sheriff, which was excluded by the court below, was relevant and proper.—*Beeson v. Wiley, Banks & Co.*, 28 Ala. 575; *Snodgrass v. Br. Bank at Decatur*, 25 Ala. 161.

5. The declarations of the defendants in attachment and the claimant, as proved by Hybert, related to past transactions, and were not competent evidence.—*Perry v. Graham*, 18 Ala. 822; *Thompson v. Mawhinney & Smith*, 17 Ala. 362; *Lundie v. Cosper*, 20 Ala. 123; *Mims v. Sturdevant*, 23 Ala. 664; *Martin v. Hardesty*, 27 Ala. 458.

3. The charge asked by the plaintiffs should have been given. It asserted a correct legal proposition, and was not abstract.—*Draughn v. Bozeman*, 3 Stewart, 243; *Terrell v. Green*, 11 Ala. 207; *Tatum v. Hunter*, 14 Ala. 557; *Corprew v. Arthnr*, 15 *ib.* 525; *Rives, Battle & Co. v. Walthall*, 38 *ib.* 329.

4. The several charges given by the court, at the instance of the claimant, were incorrect, obscure, and calculated to mislead the jury, by excluding a part of the evidence from their consideration.—*Bozeman v. Draughn*, 3 Stewart, 243; *Knight v. Bell*, 22 Ala. 198; *Dunlap v. Robinson*, 28 Ala. 100; *Dill v. Camp*, 22 Ala. 249; *Edgar v. McArn*, 22 Ala. 796; *Pritchett v. Munroe*, 22 Ala. 501; *Reese v. Beck*, 24 Ala. 651; *Upson v. Raiford*, 29 Ala. 188.

J. N. ARRINGTON, and W. C. OATES, *contra*.—1. The evidence of Strickland was properly excluded by the court. *Abney v. Kingsland*, 10 Ala. 355; *Bilberry's Adm'r v. Mobley*, 21 Ala. 277.

2. The conversation between the defendants and the claimant, as proved by Hybert, was explanatory of a material transaction, and was admissible as a part of the *res gestæ*.—*Hooper v. Edwards*, 20 Ala. 529; *Tomkies v. Reynolds*, 17 Ala. 109.

3. The charge asked by the plaintiffs, was properly refused by the court—1st, because it was abstract; 2d, because it did not assert a correct legal proposition; and, 3d, because it was obscure, contradictory, and calculated to mislead the jury. It was abstract, because the record does not show that any evidence was introduced to prove the plaintiffs' debt.—*Harrell v. Whitman*, 20 Ala. 519; *Salmons*

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v. Roundtree, 24 Ala. 458; *Johnson v. Boyles*, 26 Ala. 576; *Rolston v. Langdon*, 26 Ala. 660. It did not assert a correct legal proposition, because the law authorizes a *bona-fide* creditor to "purchase and receive the effects of his debtor, in payment of such debt, even though the *known effect* may be to hinder or defeat his other creditors."—*Young v. Dumas*, 39 Ala. 60. There can be no difference between the *known effect* and the *intended effect* of any act, for every man is presumed to intend the necessary consequences of his actions. The charge was also obscure and contradictory, because it assumed that the claimant could intend to hinder and delay other creditors, merely by securing his own just debt; that is, that he could perpetrate a fraud on others, by doing what was no fraud. It is difficult to conceive how a man can do an illegal act by doing what the law authorizes.

A. J. WALKER, C. J.—The declarations and conduct of the defendants in attachment, proved by the sheriff, transpired after the transfer to the claimant, and after the levy, and did not accompany, qualify, or explain any material fact in the case; and the claimant can not be affected by them. The court, therefore, committed no error in excluding them.

2. There was no error in the admission of the evidence of Hybert. Its tendency was to establish the sale of the stock of goods to the claimant, a material fact in the case; and it therefore could not be obnoxious to the objection of being mere declarations of the parties.

3. The charge asked should have been given. It was certainly neither abstract, nor tending to mislead. "If the purchase between the parties was intended by all of them to hinder, or delay, or defraud" creditors, it surely can not be doubted that the sale was void as to creditors. It is not sufficient to sustain a conveyance, as against creditors, that it should be upon a valuable consideration; it must also be *bona fide*. The intent to defraud creditors will vitiate a transfer of property, although made upon valuable consideration. *Bozeman v. Draughn*, 3 Stew. 243; *Terrell v. Green*, 11 Ala. 207, 213; *Tatum v. Hunter & Thomas*, 14 Ala. 557; *Cor-*

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prew v. Arthur, 15 Ala. 525; *Huggins v. Perrine*, 30 Ala. 396; *Rives, Battle & Co. v. Walthall*, 38 Ala. 329.

4. The first charge asked by the claimant, and given by the court, is, perhaps, obscure; but we would not affirm that the court erred in giving it. If it tended to mislead the jury, the plaintiffs should have sought an explanation from the court. Certainly, the buying of goods for a valuable consideration, does not constitute a fraud at all; but, if the transfer of the goods was made to defraud creditors, the valuable consideration would not sustain the transfer. The valuable consideration may be relied upon, and commented upon as evidence of *bona fides*; but it is not conclusive of it.

There was no error in giving the second charge asked, notwithstanding it too, unexplained, might mislead the jury. A debt is a sufficient consideration to sustain a sale of property; but nevertheless, if a sale of property be made in consideration of a good debt, *with a fraudulent intent*, it is void against creditors.

We do not think it is necessary for us to notice the other charges given in this case. The points arising, or likely to arise, are covered by what we have already said. While the defendants had a right to transfer their property to their father, in payment of a just debt, they had no right to make such transfer for the purpose of defrauding any creditor.—*Young v. Dumas*, 39 Ala. 60.

The judgment is reversed, and the cause remanded.

NOTE BY REPORTER.—On a subsequent day of the term, in response to an application by the appellee's counsel for a re-hearing, the following opinion was delivered:

A. J. WALKER, C. J.—The counsel for the appellee having presented a petition for a re-hearing, we have re-examined the questions arising upon the record, and are constrained to adhere to our former opinion.

It is argued in support of the petition for a re-hearing, that the charge asked by the plaintiff, and refused by the court, was abstract, and that therefore the court committed no error in not giving it. The charge is said to be abstract,

upon the ground, that there was no proof that the defendant in attachment was indebted to plaintiffs. The reply to this is, that it is settled, by decisions of remarkable frequency, that for the purpose of the trial of the right of property, the attachment is sufficient evidence that the plaintiffs were creditors of the defendants, and the claimants can not question the plaintiffs' debt. "The only question to be litigated is, whether the goods claimed really belonged to the claimant or not, as against the plaintiff, a creditor. For the purpose of this controversy, the plaintiff must be regarded as a creditor, without the production of proof of indebtedness," he having given in evidence his attachment.—*Butler & Alford v. O'Brien*, 5 Ala. 316; *Taliaferro v. Land*, 23 Ala. 369, 376; *Harrell v. Floyd*, 3 Ala. 16; *Huff v. Cox*, 2 Ala. 310; *Stone v. Stone*, 1 Ala. 582; *Hardy v. Gascoigne*, 6 Porter, 447; *Franklin v. Elliott*, 5 Porter, 182; *Hooper v. Pair*, 3 Porter, 401; *Collingsworth v. Horn*, 1 Stew. & P. 237; *Carlton v. King*, 1 Stew. & Por. 472.

If the question presented were, whether property given without valuable consideration, and in the absence of a fraudulent intent, were subject to an attachment, it would be necessary to prove the existence of the debt at the time of the conveyance; for, in such case, the conveyance would be good as to all subsequent creditors, and bad as to existing creditors. But, if there was a positive intent to defraud, the conveyance may be avoided by subsequent creditors, and the property subjected "to after-contracted debts." *Williams v. Avery*, 38 Ala. 115; *Huggins v. Perrine*, 30 Ala. 396. If, therefore, in this case, there was a fraudulent intent of the parties who made and accepted the transfer, the plaintiffs may subject the property transferred, though their debt had no existence prior to the issue of the attachment; and the claimant can not controvert that the plaintiffs were creditors at that time. Therefore, the introduction in evidence of the attachment, was such proof of the plaintiffs' character of creditor, as would justify the charge that the fraudulent intent of the parties would vitiate the transfer, and the charge asked was not abstract.

It is next contended, that the charge asked and given is inconsistent with the decision in the case of *Young v. Dumas*,

delivered at the January term, 1863. In that case it was decided, that a *bona-fide* creditor may, by *fair* contract, purchase and receive the effects of his debtor in payment of his debt, "even though the *known* effect may be to hinder or defeat his other creditors." A similar doctrine is stated, though not so strongly, in *Borland v. Mayo*, 8 Ala. 104, 118. The principle is, that the mere fact, standing alone, that the necessary effect of the conveyance would be to hinder and defeat other creditors, would not vitiate it. But this principle is not in conflict with the charge asked. The doctrine of that charge is, that the fraudulent intent would make the property liable to debts; and the invalidity of the conveyance, in *Young v. Dumas*, would have been declared, if a fraudulent intention had been present. The authorities cited in our original opinion show, that a valuable consideration would not sustain a conveyance made with the intention of defrauding creditors.

It is contended, also, that the parties could not intend to "hinder, or delay, or defraud creditors," by securing a *just* debt, and that therefore the charge contains a solecism. We think not. The agency of a conveyance to secure or to pay a just debt, may be employed to effect a fraudulent purpose; and if so, it is void as to creditors. We think the charge asked should have been given.

The application for a re-hearing is refused.

PATTON vs. GILMER ET AL.

[ACTION FOR BREACH OF CONTRACT.]

1. *Manufacture of arms by or for State.*—There is no constitutional provision, State or Federal, which prohibits the manufacture of arms by a State, or the making of a contract with other persons for their manufacture.
2. *Validity of contract between State and Alabama Arms Manufacturing*

Company.—Neither the contract between the State of Alabama and the *Alabama Arms Manufacturing Company*, nor the act of the legislature under which that contract was made, (Session Acts, 1861, p. 75,) shows on its face that the arms were to be manufactured during the late war, or that the contract was otherwise illegal and void; consequently, the court can not, on demurrer to a complaint for a breach of the contract, declare the contract void.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. ABRAM MARTIN, special judge, selected by the parties on account of the incompetency of the presiding circuit judge.

THIS action was brought by Robert M. Patton, as the governor of the State of Alabama, against Wm. B. Gilmer and others, and was commenced on the 10th day of November, 1866. The complaint was in the following words:

"The plaintiff, as governor of the State of Alabama, claims of the defendants six hundred thousand dollars, for the breach of the condition of a bond made by the defendants on the 20th day of March, A. D. 1862, payable to the plaintiff, in the sum of five hundred thousand dollars, with condition that the Alabama Arms Manufacturing Company shall well and truly keep and perform all the stipulations of the contract entered into by the said company with John Gill Shorter, as the governor of the State of Alabama, on the 20th day of March, 1862, of which the following is a copy," setting out the contract. "And the plaintiff says, that the conditions of the said bond have been broken, in this: 1st, that the said Alabama Arms Manufacturing Company has not established, within the limits of this State, an armory, or manufactory for the making of arms, although a reasonable time for doing so has long elapsed; 2d, that the said company has not made and delivered any fire-arms to the State of Alabama, according to the terms of the said contract; 3d, that the said company has not returned, or paid back to the State of Alabama, the amount of money received by the said company from the said State, or any part thereof; to the damage of the plaintiff as above stated."

The following is a copy of the contract referred to:

"Memorandum of a contract, entered into the 20th March,

1862, between John Gill Shorter, governor of the State of Alabama, and the Alabama Arms Manufacturing Company, a body corporate for the manufacture of arms in the State of Alabama. The said John Gill Shorter, governor as aforesaid, hereby agrees and stipulates upon his part, and in behalf of said State of Alabama, that he will deliver and advance to the said Alabama Arms Manufacturing Company the sum of two hundred and fifty thousand dollars in Alabama State bonds, having ten years to run, and bearing interest at the rate of eight per cent. per annum, and having interest coupons attached, payable semi-annually, at their par value; for which the said company shall execute their bond, with satisfactory personal security, to be approved by the said governor, conditioned to perform on their part the stipulations of this contract, or to return the said amount on failure thereof. In consideration of the advance aforesaid, the said Alabama Arms Manufacturing Company stipulate and agree on their part, that they will establish within the limits of the State of Alabama an armory, as soon as practicable; and that they will make and deliver to the State of Alabama, as soon as practicable, or within a reasonable time, in full payment and satisfaction of the said sum so advanced, fire-arms of the following character and description, and at the prices herein fixed—that is to say, a gun, in outward finish like the Enfield rifle-musket, with sword bayonet, and in interior finish to conform to the standard of the Confederate States of America, at the price of thirty-five dollars each; said arms to be inspected by a competent and impartial officer, to be appointed by the State of Alabama, and to be delivered at the armory, or at the river landing or railroad station nearest the same, properly boxed, and with the usual findings, at the election of the State. It is further stipulated between the parties, as follows: The said armory shall be located in the State of Alabama, and shall not be removed beyond the said State, or abandoned, under the penalty of forfeiture to the State, until full payment and satisfaction shall have been made of the funds advanced by the State to the company under this contract. In all settlements between the said State and the said company, the said State

shall be allowed interest, at the rate of eight per cent. per annum, upon all advances made to the company, computing from the date of the advance. No contract for the manufacture of arms shall be made by the said company, with any individual or corporation, other than the said State of Alabama, unless with the consent of the governor of said State for the time being, until the said company shall have fully complied and performed the said contract with said State; and the said State shall always enjoy the right and privilege, over all others, of contracting for, or purchasing arms of said company, at a fair market price; the said State being only required to give reasonable notice of the kind and quality of arms it may require. In the event the said armory, its fixtures, and materials, shall be permanently captured or destroyed by the enemy, then any loss which may occur from such capture or destruction, to the extent of the advance made by the said State, shall be sustained by the said State; and the stipulations of the said contract herein contained to furnish arms shall cease, and be of no effect; and all unsettled matters of account, and all other matters not specially herein provided for between the said State and the said company, shall be adjusted and settled upon principles of equity. It is understood and agreed between the parties, that this contract is entered into in view of the provisions, and pursuant of the objects, of an act of the legislature of Alabama, approved December 7th, 1861, entitled 'An act to encourage the manufacture of fire arms and munitions of war in this State.' It is further stipulated and agreed, that, in addition to the personal security to be given for the faithful performance of this contract by said company, the said company will make and execute a mortgage upon their armory, with the fixtures and machinery. In testimony whereof, the parties to this contract have hereunto set their hands, and affixed their seals in due form of law, the day of the date first above written."

(Signed by John Gill Shorter, as governor, and under the seal of the State; and by William B. Gilmer, as president, and John D. Phelan, as secretary of said corporation.)

The act of the legislature, under which this contract was made, and which was approved on the 7th December, 1861, is in these words :

“An act to encourage the manufacture of fire-arms and munitions of war in this State.

“SECTION 1. Be it enacted by the senate and house of representatives of the State of Alabama in general assembly convened, That the sum of two hundred and fifty thousand dollars, out of any money in the treasury not otherwise appropriated, be, and the same is hereby, appropriated and placed under the control of the governor, and subject to his warrant, for the purposes hereinafter specified.

“SEC. 2. Be it further enacted, That if any individual or company shall hereafter propose to manufacture fire-arms in this State, the governor is hereby authorized to advance to such individual or company such portion of said sum as he may deem advisable, and may take security for the return of said sum so advanced, or may contract with said individual or company to receive of them, in lieu of said sum advanced, fire-arms to be manufactured by them, of such kind, quality and description as he may designate and approve of ; in all cases taking from such individual or company bond with approved security for the faithful performance of their contract.

“SEC. 3. Be it further enacted, That in like manner, and under the same restrictions, the further sum of fifty thousand dollars is hereby appropriated, to encourage the manufacture and preparation of powder, saltpetre, sulphur and lead.”—Session Acts, 1861, p. 75.

The defendants demurred to the complaint, and assigned the following as grounds of demurrer : “ 1st, that it appears, in and by said complaint, that the only consideration of the contract, for the faithful performance of which the bond in the complaint mentioned was given, was the issuance of the bonds of the State of Alabama, for the sum of two hundred and fifty thousand dollars, in aid of the late war, which said consideration was illegal and void ; 2d, that it appears from the said complaint, that the contract and bond therein mentioned and set up was made and executed in aid

of the late war, and are illegal and void." The court sustained the demurrer, and its ruling thereon is now assigned as error.

JOHN W. A. SANFORD, Attorney-General, and STONE, CLOP-TON & CLANTON, for appellant.

WATTS & TROY, and ELMORE, KEYES & MORRISSETT, *contra*.

BYRD, J.—Without having the aid of an argument at the bar, or of a brief from counsel, we propose to dispose of the questions raised by the assignments of error, on the record in this important cause.

We are not aware of any provision of the State or Federal constitution, which inhibits the manufacture of fire-arms by the States, or the making a contract therefor. The contract sued on is founded on an act of the general assembly of the State, approved December 7, 1851, (Pamph. Acts, p. 75,) and which was again approved by an ordinance of the State convention of 1865.—*Vide* Ordinance No. 26. The defendants in the court below sought by a demurrer to raise the question of the illegality of the consideration and obligations of the contract, by substantially averring that they were contracted in aid of the late war against the national government. We suppose that it is contended that the contract was in violation of the public policy of the government of the United States, as the supreme government of this country, and that it is therefore illegal and void.

The illegality of the consideration or obligations of a contract may be raised by way of demurrer, whenever it is *clearly* apparent on the face of the complaint; but, when it is not, the party is put to his plea.—1 Chitty's Pleadings, 311, 484a.

We are of opinion that, upon the face of the complaint, and of the act of the 7th December, 1861, it is not clear that the contract was illegal, or that it was entered into with *the intention* to give aid to the war then being waged between the United States and the belligerent southern States. Neither the law which authorized the contract, nor the contract itself, required that the arms should be made during the war, nor within any specified time. The contract-

ing parties *may* still have the right to insist on the performance of the stipulations of the original contract, *if it were legal*; and if performed, the defendants would be discharged from any liability on the bond executed by them.

But upon these questions we express no opinion, further than to say that the question of the illegality of the contract is not so clearly apparent on the face of the complaint as to authorize a court to sustain a demurrer on that ground, or to pass upon the question sought thereby to be raised. The court below should have overruled the demurrer. In so holding, we do not intend to intimate that we consider the complaint good, or that any action can be maintained on the contract set out. We confine ourselves *strictly*, as the court below was bound to do, to the assignments specifically made by the demurrer. If a contract is made, which, by one construction, would be void for illegality, and by another would be valid, the latter would be adopted, in order to give effect to the contract.

If hereafter, under an appropriate plea, the evidence should satisfy a jury that the intention of the parties was in violation of law, or of public policy, then the court would be called upon to instruct the jury as to the law in such a case; and may be called upon to charge them upon the effect of the evidence introduced on the trial as to such intention, as well as what *constitutes such an illegality in a contract as will render it void*.

We do not suppose that the power of a State to issue bonds will be questioned; but we do not think that the question of the authority of the governor to issue the bonds of the State, instead of paying the money appropriated by the act of December 7th, 1861, is raised by either of the grounds of demurrer, and we shall not therefore consider it.

For the error pointed out, the judgment of the circuit court is reversed, and the cause remanded.

KETCHUM AND WIFE *vs.* DENNIS AND WIFE.

[MOTION FOR NEW TRIAL ON SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *When appeal lies.*—The action of the primary courts in granting or refusing a new trial under the ordinance of the State convention adopted on the 28th September, 1865, (No. 26,) unlike their action on a petition for re-hearing under the Code, (§§ 2407-17,) will not support an appeal.

APPEAL from the Probate Court of Wilcox.

IN the matter of the petition of J. C. Dennis and Clara A. Dennis, (formerly Clara A. Cleagh,) his wife, to set aside a decree of said probate court, rendered on the 13th March, 1865, on final settlement of the accounts and vouchers of W. H. Ketchum and Willie S. Ketchum, as guardians of the said Clara, and to obtain a new trial of the cause. The petition was sworn to, by both of the petitioners, before a notary public in New Orleans, on the 6th July, 1866; was filed in the office of the probate judge, on the 13th August, 1866; and alleged that said petitioners "were unavoidably absent at the time of the rendition of said decree—in fact, never had notice—had no attorney present in said court at the time of rendering said decree, and that a good and meritorious defense exists against said decree." On the hearing of the application, on the 20th September, 1866, numerous objections were raised by the defendants, which require no particular notice. The court overruled all the objections, and rendered the following decree: "This being the day to which said cause was continued, the parties came, by their attorneys, and the motion was submitted to the court; and the court being satisfied, from all the facts submitted by affidavit and inspection of the record, that a good and meritorious defense exists, it is therefore ordered, adjudged, and decreed, that a new trial in this cause be allowed and awarded, and a new trial is hereby allowed and awarded." The defendants reserved exceptions to the

overruling of their several objections, and to the judgment or decree granting a new trial; and they now assign these matters as error. The appellees submitted a motion to dismiss the appeal.

WATTS & TROY, with A. B. COOPER, for the motion.—The action of the primary courts, in granting or refusing a new trial, is matter of discretion, and not revisable on error or appeal.—*Spence v. Tuggle*, 10 Ala. 538; *Benje v. Creagh's Adm'r*, 21 Ala. 151; *Walker v. Blassingame*, 17 Ala. 810; *Martin v. Higgins*, 23 Ala. 775. The ordinance of the State convention, under which the application for a new trial in this case was made, makes no provision for an appeal, but leaves the motion to be governed by the legal principles already well settled; while the statute which allows a rehearing at law after final judgment, (Code, §§ 2407–17,) contemplates a new action at law, in lieu of a resort to a chancery suit.

R. H. SMITH, and COCHRAN & DAWSON, *contra*.—In ordinary motions for a new trial, the application is made during the term, and before the court has lost the control of its records. There is, properly speaking, no final judgment, but the whole matter is still *in fieri*. The application is made, too, to the judge who tried the cause, who has all the facts and incidents of the trial fresh in his mind, and whose discretion is governed by many circumstances which can not be brought to the knowledge of the appellate court. But an application for a new trial, under the ordinance of the State convention, is the commencement of a new action, which impeaches and sets aside the original action. The ordinance specifies the manner in which the application shall be made, the grounds on which it must be founded, and the time within which it must be made. The case is a new one, and is addressed to a new judge, who knows nothing of the merits of the original action, and could not be influenced by that knowledge, if he had any. The proceeding is strictly statutory, and the judge is invested with no discretion in the matter. The ordinance gives the right to a new trial, and the party who brings himself within its

terms is entitled to a new trial, as a matter of right. The refusal of this right, when it ought to be granted, or the granting of a new trial when the ordinance does not authorize it, is such a final judgment as will support an appeal, under the general statutes.—Code, § 3016; Session Acts, 1857–58, p. 244. The application is strictly analogous to a petition for a re-hearing under the provisions of the Code, which is revisable on appeal.—*Shields v. Burns*, 31 Ala. 535; *White v. Ryan*, 31 Ala. 400; *Pratt & McKenzie v. Keils & Sylvester*, 28 Ala. 390; *Elliott v. Cook*, 33 Ala. 490; *Stewart v. Williams*, 33 Ala. 492; *Davis v. McCampbell*, 37 Ala. R. 609.

JUDGE, J.—A material difference exists, between an application for a re-hearing under section 2407 or 2408 of the Code, and an application for a new trial under the ordinance of the State convention, adopted September 28, 1865. An application for a re-hearing, under the Code, must be by petition, in which the matter complained of must be stated, with a prayer for the appropriate relief; and the court may direct the trial of all questions of fact by a jury, upon an issue made up under its direction. Such a proceeding contains more of the elements of an original action, than of a motion for a new trial, and bears a greater similitude to the former than to the latter. Hence, it has been held by this court, that a proceeding under the Code must be regarded as a new action, the object of which is to obtain a re-hearing and trial on the merits in the original action; consequently, appeals from final judgments in such proceedings have been entertained.—*Pratt & McKenzie v. Keils & Sylvester*, 28 Ala. 390; *White v. Ryan & Martin*, 31 Ala. 400; *Shields v. Burns*, *ib.* 535; *Garrett & Bibb v. Terry*, 33 Ala. 514; *Davis v. McCampbell*, 37 Ala. 609; *Elliott v. Cook*, 33 Ala. 490; *Stewart v. Williams*, 33 Ala. 492.

The ordinance of the convention provides that, “in all cases in which judgments or decrees have been rendered, in all courts of record in this State, since the 11th January, 1861, and prior to the date of this ordinance, the party against whom such judgment has been rendered shall be

entitled to a new trial, upon affidavit that he was unavoidably absent from the court at the time of the rendition of the judgment, and that he had no attorney present in the court; *provided*, the court shall be satisfied, from all the facts that may be submitted by affidavit by both parties, that a good and meritorious defense exists."—Ordinance, No. 26. As will be perceived, no proceeding for relief against a judgment or decree, under the provisions of this ordinance, can be any other than a mere motion for a new trial. Judgments and decrees had doubtless been rendered during the war, against parties at the time unavoidably absent; and we think it was intended by the convention, that every such party should be placed in a condition, as regards a new trial, as favorable as that which he would have occupied, had he been present, in person or by attorney, when the judgment or decree was rendered. Had such a party been thus present, he might, before the expiration of the term, have moved the court for a new trial; but no appeal from the decision of the court on the motion could have been taken by either party; for it has been the settled law of this State, for a period of more than forty years, that decisions on motions for new trials are matters within the judicial discretion of the presiding judge, and not revisable on error.—*Phleming v. The State*, Minor, 42; *Shepherd's Digest*, 698, § 9. It follows, that no appeal will lie from a decision and motion for a new trial, when the motion is made pursuant to the ordinance of the convention. To hold otherwise, would be to overturn a long-established rule, founded in wisdom, and beneficial in its results.

Appeal dismissed.

COWAN *vs.* COOPER.

[ACTION FOR BREACH OF WRITTEN CONTRACT.]

1. *Admissibility of parol to affect consideration of writing.*—In an action on a written contract, by which the defendant promised to pay the plaintiffs a specified sum of money, “to be void if any of them shall put in any plea or defense to prevent the probating” of a certain will, it is permissible for the defendant to prove, by parol, that “in addition to the consideration specified in said writing, it was understood and agreed at the time of the execution of said contract, and before the defendant would sign the same, that she was not to be sued, nor disturbed in any way by the plaintiffs, about the property given to her by the said will.”
2. *Burden of proof as to consideration of contract.*—In an action on a written contract, the writing itself imports a consideration, (Code, § 2278,) and if the consideration is impeached by plea, the *onus* is on the defendant.
3. *Redundant evidence.*—Evidence which simply tends to prove an admitted fact in the case, or a fact which, under the pleadings, the law presumes, is redundant, and the court is not bound to receive it.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. JOHN E. MOORE.

THIS action was brought by William Cowan and others, against Isabella Cooper, and was commenced on the 14th August, 1856. The complaint was as follows: “The plaintiffs claim of the defendant five hundred dollars, due on an instrument in substance as follows,” setting out the writing copied below. “Plaintiffs sue for said sum of money, due on said contract, which is their property; and plaintiffs say, that neither they, nor any of them, put in any plea or defense to prevent the probating of the last will and testament of Wade Cooper, deceased, and that they are the only heirs now in being, or in being at the date of said instrument, of Nancy Cowan, deceased. Plaintiffs sue for said sum of money, with the interest thereon.”

The following is a copy of the instrument referred to:

„\$500. On or before the first day of March, 1856, I

promise to pay William A. Cowan, the guardian of the infant heirs of Nancy Cowan, deceased, five hundred dollars, for equal interest and mutual benefit of William A. Cowan, Thomas Cowan, Washington B. Cowan, Gibson Cowan, John W. Cowan, Justina Cowan, and Wade Cowan, children of the said Nancy Cowan, deceased; to be void, if any of the heirs of the said Nancy Cowan, deceased, shall put in any plea or defense to prevent the probating of the last will and testament of Wade Cooper, late of said county of Lawrence, deceased. Witness my hand and seal, this 9th day of July, 1855."

(Signed and sealed by the said Isabella Cooper, and attested by two witnesses.)

The defendant pleaded, "in short by consent, the general issue, with leave to give in evidence any special matter which, if specially pleaded, would be a good plea in bar"; and issue was joined on this plea. "On the trial," as the bill of exceptions states, "the plaintiffs read to the court and jury the obligation which is set out in their complaint, and rested their case. The defendants then proved, by H. W. Warren, one of the attesting witnesses, that said agreement sued on was made between the defendant, who is the widow of Wade Cooper, deceased, and the plaintiffs, who are his grand-children, on the eve of probating his will; and that in addition to the consideration specified in said instrument, it was understood and agreed at the time of the execution of said contract sued on, and before the defendant would sign the same, that she was not to be sued, nor disturbed in any way by the plaintiffs, about the property given to her by the will of the said Wade Cooper. To this portion of the evidence the plaintiffs objected, and moved the court to exclude the same from the jury. The court overruled the objection, and permitted the evidence to go to the jury; to which the plaintiffs excepted.

"The defendant offered in evidence the original papers in a certain cause now pending in said circuit court, wherein these plaintiffs sued said defendant for two slaves, Maria and Julia; which suit was brought after the execution of the obligation which is the foundation of this suit, and which said slaves were bequeathed to the defendant in the

will of said Wade Cooper, deceased. The proof showed, that the defendant set up claim to said slaves as her separate estate, and refused to deliver them to the executor of said Wade Cooper; that she has had the possession of them, and claimed them as such, since the death of her said husband. The proof tended to show, also, that these slaves had been in the possession of the plaintiffs' mother, for about two years preceding her death, under a gift from said Wade Cooper and wife (said defendant), to her for life, with remainder to said plaintiffs. The mother of said plaintiffs was dead, when the suit for said slaves was instituted. To the introduction of the papers of said suit as evidence the plaintiffs objected, but the court overruled their objection; to which the plaintiffs excepted.

"The plaintiffs introduced a witness to prove that said Wade Cooper expressed dissatisfaction with his will after he had made it, because one of his daughters was dissatisfied. The court refused to permit the plaintiffs to prove this, and the plaintiffs excepted. The plaintiffs further introduced a witness to prove that said testator, for some time before he made his will, and until his death, was in a feeble state of mind and body, and, in connection therewith, that he was dissatisfied with his will. The court refused to permit this proof to go to the jury, unless the plaintiffs proposed to show, in addition thereto, his incapacity to make a will, or some state of facts to render his capacity doubtful, such as fraud, or undue influence; to which rulings of the court the plaintiffs excepted. The plaintiffs further introduced a witness, by whom they proposed to prove that the testator was dissatisfied with his will, because one of his daughters was dissatisfied with it; and that thereupon, after making deeds of gift to Mrs. Warren and Mrs. Drane, two of his daughters, conveying certain property to them in addition to their legacies in the will, his wife and daughters being then satisfied with the will, he expressed himself satisfied. The court refused to permit the plaintiffs to make this proof, unless they proposed to show, in addition thereto, his incapacity to make a will, or some state of facts to render his capacity doubtful, or fraud, or undue influence; to which ruling the plaintiffs excepted.

The defendant proved, that Mrs. Cowan, the plaintiffs' mother, while in possession of the slaves sued for in said suit, wanted to get a boy for the girl Maria, and wanted her father to give her a title to the girl; and that the testator said, when he made his will [he would] fix it. The plaintiffs objected to this evidence, but the court overruled their objection; to which the plaintiffs excepted. There was no proof offered by the defendant of a want of consideration in the contract sued on, or a violation thereof, except the said suit for the slaves, and the proof by the witness Warren, above stated, as to the consideration. The plaintiffs asked the court to charge the jury, that the said suit by the plaintiffs against the defendant, for the said slaves, was no violation of the contract sued on; which charge the court refused to give, and the plaintiffs excepted to its refusal."

The several rulings of the court to which exceptions were reserved by the plaintiffs, as above stated, are now assigned as error.

D. P. LEWIS, and RICE, SEMPLE & GOLDTHWAITE, for the appellants.

PICKETT & WALKER, *contra*.

A. J. WALKER, C. J.—This suit is founded upon a written promise to pay five hundred dollars, to be void if any of certain named persons should put in any plea or defense to prevent the probating of a specified will. The defendant was permitted to prove an agreement, prior to the execution of the promise, exacted as an indispensable pre-requisite thereto, that she should not be sued or disturbed in any way about certain property given to her by a specified will. This evidence, going to the consideration, was not obnoxious to the rule as to the variation of written contracts by parol evidence.—2 Parsons on Contracts, (5th ed.) 555; *Thomas v. Barker*, 37 Ala. 392; *Corbin v. Sistrunk*, 19 Ala. 203; *Honeycut v. Strother*, 2 Ala. 135; *Simonton v. Steele*, 1 Ala. 357; *Barlow v. Fleming*, 6 Ala. 146. The evidence of the institution, after the execution of the defendant's written promise, of a suit by the plaintiffs for two of the slaves bequeathed to the defendant in the specified will,

was obviously admissible, on account of its effect upon the point of a failure of consideration.

[2-3.] Exceptions were taken in the court below, to the exclusion of evidence offered by plaintiffs, tending to impeach the will, the contestation of which by plaintiffs was guarded against by the contract. The only point of view, in which this evidence could have been admissible in this suit, is to show that the validity of the will was doubtful, and therefore an agreement not to contest would constitute a valid consideration.—*Prater v. Miller*, 25 Ala. 320. The plea of the defendant was the general issue, "with leave to give any matter in evidence which could be specially pleaded in bar." We therefore can not ascertain, from the plea, that the defendant in any way controverted the proposition, that there was such doubt of the validity of the will as would constitute a legal consideration for a promise to pay for a forbearance to contest. The bill of exceptions does not show that the defendant controverted the consideration, on the ground of the absence of such doubt, but tends very strongly to show the contrary. There seem to have been two considerations for the contract of the defendant—the forbearance to contest the will, and the forbearance to disturb the defendant's right to certain property bequeathed by the will. So far as the former is concerned, there seems no controversy by the defendant. So far as the latter is concerned, the defendant's efforts seem to have been directed to the proof of a failure on the part of the plaintiffs to fulfill their promise of abstinence from suing or disturbing the defendant in her right to the specified property. The mere plea of a want of consideration did not throw upon the plaintiffs the *onus*. Unlike the case of *Prater v. Miller*, (*supra*,) this suit is upon a written promise to pay, the consideration of which is presumed. The statute provides, that when its consideration is impeached by plea, "the burden of proof is on the defendant."—Code, § 2278. Therefore, the consideration was an established fact, which would be asserted by the court to the jury, except in so far as it was assailed by the evidence. Then, inasmuch as there was no evidence attacking the consideration, to the extent of its dependence upon the doubtfulness of the validity of

the will, the testimony offered by the plaintiffs, conducing to show such doubtfulness, would have been clearly redundant; it would have been mere proof of a fact which the law presumes. Such testimony the court is not bound to receive, and we will not reverse for the failure to receive it.

The court was asked to charge the jury, that the suit brought by the plaintiffs, for the recovery of two slaves bequeathed to the defendant, was no violation of the contract "sued on." Such a suit was certainly no violation of the written contract; but it was a violation of the agreement, which constituted a part of the consideration of that contract. We understand the charge requested and refused to specify the particular contract sued upon, which is in writing, and set forth in the complaint, and to assert that that contract was not violated. The distinction between a violation of the written contract, and of the promise which constituted in part its consideration, is important. We think the charge, as asked, should have been given.

Reversed and remanded.

CHISHOLM vs. MCGEHEE.

[APPLICATION FOR MANDAMUS TO COMPTROLLER OF PUBLIC ACCOUNTS.]

1. *Comptroller's authority and duty to draw warrants on treasurer.*—The comptroller of public accounts has no authority to draw a warrant on the treasurer, for the payment of any claim against the State, unless expressly authorized and required by law to do so.
2. *Compensation of salt commissioner; how paid.*—The act approved December 9, 1862, providing for the appointment of a salt commissioner by the governor, and fixing his compensation, (Session Acts, 1862, p 57,) while it appropriates one hundred thousand dollars, "out of any money in the treasury not otherwise appropriated," to carry out the provisions of the act, does not require that the compensation of the commissioner shall be paid by the warrant of the comptroller on the treasurer.
3. *When mandamus lies.*—The courts will not grant a *mandamus*, to com-

pel the performance of an official act by a public officer, except where the party applying for the writ has no other adequate and specific remedy.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. GEO. GOLDTHWAITE.

THIS was an application by Albert G. McGehee, for a *mandamus* against Marion A. Chisholm, the comptroller of public accounts, requiring that officer to draw his warrant on the State treasurer, in favor of the petitioner, for the sum of four thousand one hundred and sixty-six 66-100 dollars, claimed by the petitioner to be due to him from the State, as compensation for his services as salt commissioner, under the appointment of the governor, from the 22d May, 1862, until the 20th January, 1864. The petitioner alleged his appointment by the governor, (under the authority of the act of the legislature approved on the 9th December, 1862,) the performance by him of the duties of the office during the period specified, the amount of compensation which he was entitled to receive from the State, the presentation of his account to the comptroller on the 16th February, 1867, and the refusal of the comptroller to draw a warrant in his favor on the State treasurer. The comptroller accepted service of a rule *nisi*, and filed an answer, in which he admitted the truth of all the facts stated in the petition, but averred—1st, that the petitioner's claim "was created in aid of the late war," and was therefore declared void by the ordinance of the State convention adopted on the 28th September, 1865; 2d, that the petitioner's compensation, as fixed by the governor, "was to be paid in Confederate currency, or treasury-notes, then and since much depreciated in value, and ought not to be paid in gold, or in present currency, without a proper reduction"; and, 3d, "that there is no appropriation of money by the general assembly, out of which said debt can be paid." On the hearing, on the petition and answer, the circuit court awarded a peremptory *mandamus*; and its judgment is now assigned as error.

The following is the act under which the petitioner was

appointed, and under which he claimed compensation for his services :

“*An act to enable the people of Alabama to procure necessary supplies of salt at reasonable prices, and for other purposes.*

“SECTION 1. *Be it enacted by the senate and house of representatives of the State of Alabama in general assembly convened,* That all contracts and agreements made since the adjournment of the last regular session of the general assembly of the State of Alabama, by the governor of said State, and for and on behalf of said State, for the purchase, manufacture, and transportation of salt, for the use of the people of said State, be and the same are hereby ratified and confirmed.

“SEC. 2. *Be it further enacted,* That the governor be, and he is hereby authorized, for and on behalf of said State, to continue the operations of manufacturing salt, now being carried on under his direction upon the upper salt lands of the State, in the county of Clarke; and to use such means for the development of the saline waters of the State, and the speedy and efficient production of salt therefrom, as in his judgment the wants of the people and the interests of the State may require; and to take such other measures and make such other contracts as he may deem expedient to secure a timely supply of salt for the people of Alabama.

“SEC. 3. *Be it further enacted,* That the governor of Alabama be, and he is hereby, authorized to appoint an agent, to be styled the ‘Salt Commissioner of Alabama,’ to superintend the operations of developing the saline waters of this State, and the manufacture of salt provided for in the preceding section of this act; and to be removable at the discretion of the governor. Said commissioner shall give bond in the sum of fifty thousand dollars, payable to the State of Alabama, and approved by the governor, conditioned for the faithful performance of his duties as such agent and commissioner; and shall be allowed for his services reasonable compensation, to be fixed by the governor, not to exceed the rate of two thousand five hundred dollars per annum; and A. G. McGehee, for the services here-

tofore rendered by him as salt commissioner, under appointment of the governor, shall be allowed the compensation provided for in the preceding part of this section.

"SEC. 4. *Be it further enacted*, That the salt manufactured or purchased under the provisions of this act shall be distributed among and sold to the inhabitants of this State, at prices not to exceed the cost of manufacture, or purchase, and sacking, with transportation and other incidental expenses added, when not sold at the place of manufacture or purchase. In the distribution thereof, due regard shall be had for the wants of counties remote from means of public transportation; and no person shall be entitled to purchase said salt, except for private use, nor in quantities greater than twenty-five pounds per head for his family, or for individuals or families *bona fide* represented by him, until all the people of the State are supplied.

"SEC. 5. *Be it further enacted*, That, in order to enable the governor to carry out the provisions of this act, the sum of one hundred thousand dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated out of any money in the treasury not otherwise appropriated.

"SEC. 6. *Be it further enacted*, That the governor may at any time lease out the said works, or any portion thereof, and any other, or any portion of the State salt works which the State may regain possession of, by the recission of any existing contract between said State and John P. Figh, as well as the salt lands belonging to said State, on such terms as the governor may deem best for the interests of the State."

JOHN W. A. SANFORD, Attorney-General, for the State.
ELMORE, KEYES & MORRISSETT, *contra*.

BYRD, J.—The rule seems to be firmly established, that where a party applying for a writ of *mandamus* has another legal and specific remedy, the court will not grant the writ. It is a high prerogative writ, and never to be resorted to, except where otherwise justice would be obstructed.—6 Bacon's Abr. 419, 431; *Mead v. Dunn*, Minor, 46; *Jones, Ex*

parte, 1 Ala. 15; *Munsony*, *Ex parte*, 1 Ala. 98; *Tarver v. Commissioners' Court*, 17 Ala. 530; *Ex parte Elston*, 25 Ala. 73; *Tennessee & Coosa Railroad Co. v. Moore*, 36 Ala. 372.

In the application of the above rule, the adjudications are not uniform and harmonious. We propose to adhere to what we conceive the current of the decisions of this court, which, in the main, have been sound, and consistent with well settled principles. We shall confine this opinion to the case before us, which involves the general power of the courts to require the comptroller to issue a warrant to persons claiming a debt or salary from the State.

Is the case made by the record one in which the appellee has the right to require the appellant to issue a warrant on the treasurer? Among the duties imposed by section 365 of the Code upon the comptroller, is one "to draw warrants on the treasurer, for the payment of all moneys directed by law to be paid out of the treasury, in favor of the person authorized to receive the same; stating in such warrant on what account the same is due, and, in cases of special appropriation, referring to the law under which it is drawn." Section 37 of the 4th article of the constitution provides, that "no money shall be drawn from the treasury, but in pursuance of an appropriation made by law." By section 3170 of the Code, the treasurer is required "to pay all warrants drawn, under authority of law, by the comptroller on the treasurer, and to pay no money out of the treasury, except on the warrant of the comptroller."

Under the 3d section of an act approved December 9th, 1862, (Pamphlet Acts, 57,) the governor was authorized to appoint a "salt commissioner," who should "be allowed for his services reasonable compensation, to be fixed by the governor, not to exceed the rate of two thousand five hundred dollars per annum"; and it further provides, that "A. G. McGehee, for the services heretofore rendered by him as salt commissioner, under appointment of the governor, shall be allowed the compensation provided for in the preceding part of this section." The 5th section of the act appropriates one hundred thousand dollars, "out of any money in the treasury not otherwise appropriated," to carry out the provisions of the act. This is an appropriation

out of a specific fund, if any was then in the treasury not otherwise appropriated; and it would seem from the language of the act, to be under the control of the governor, and not of the comptroller.

The above acts are the only ones which make any provision for the compensation of the salt commissioner, and any appropriation which can be construed into an authority to any officer of the State government, to pay the appellee for his services as salt commissioner. All the general appropriation laws authorize the comptroller to draw his warrant on the treasurer, for the several amounts appropriated. This is in strict conformity to the constitution, and to the provisions of section 365 of the Code. The comptroller, unless expressly authorized by law, has no power, or right, to draw a warrant on the treasurer for the payment of any claim. The act approved December 9th, 1862, referred to, does not authorize the comptroller to draw any warrant on the treasurer, for the payment of the compensation, prior or future, of the appellee as salt commissioner. The act, at most, only authorized the comptroller to draw a warrant in favor of the governor, for the amount appropriated, to be paid "out of any money in the treasury not otherwise appropriated." The act imposes no duty on the comptroller; and if he was authorized to issue a warrant in favor of the governor, it was not by any provision of that act.

None of the cases above cited from the decisions of this court are in conflict with these views, but all are in harmony therewith. In the case of *The Tennessee & Coosa R. R. v. Moore*, (*supra*,) the governor was required by law to draw a warrant on the treasurer; and this court held, that this duty could be enforced by *mandamus*. But, upon the following authorities, it is to my mind questionable, whether this court has the right or power to enforce by *mandamus* any duty imposed upon the governor of the State by law. *Hawkins v. The Governor*, 1 Pike, 570; *Law v. Towns*, 8 Georgia, 360; *People v. Bissell*, 19 Ill. 259; *State v. Governor*, 1 Dutch. 331; *Houston R. R. Co. v. Randolph*, 24 Tex. 317; *Dennett, petitioner*, 32 Maine, 508; *Moran v. Smith*,

American Law Register, for 1865, p. 630, (August No.); and authorities cited in the above cases.

Sections 365 and 370 of the Code, construed together, clearly show in what cases the comptroller is authorized by law to draw a warrant on the treasurer; and neither the Code, nor any subsequent statute, having authorized the comptroller to draw a warrant in favor of the appellee, the former properly refused to do so.—*Ex parte Lynch*, 2 Hill, (N. Y.) 45; *Lynch v. The Mayor*, 25 Wendell, 680; *Tully, Ex parte*, 4 Pike, 220.

If the appellee is entitled to recover any thing from the State, he is not left without an adequate and specific remedy, but is authorized by law to sue in the courts of the State; and when he obtains a judgment, the law provides a mode of payment; and therefore the extraordinary procedure by *mandamus* is not allowable.—Code, §§ 2133, 2140, and authorities above cited.

The true rule on this question may be thus expressed: This court will not require any officer to do an act, which is not specifically and especially authorized by law, at the instance of another, in a proceeding by writ of *mandamus*; and that the comptroller is not authorized to issue a warrant on the treasurer, unless so required by law to do. It results, that the judgment of the circuit court must be reversed, and the proceedings in that court be dismissed, at the costs of the appellee. Let a judgment be entered accordingly.

WALKER, C. J., not sitting.

WILLS & HOBBS vs. RAND'S ADM'RS.

[ISSUE AS TO INSOLVENCY OF DECEDENT'S ESTATE.]

1. *Rejection of claim against estate; re-hearing discretionary.*—It is discretionary with the probate court, having rejected a claim filed against

an estate which has been reported, but not decreed insolvent, to grant a re-hearing as to the rejected claim, at the instance of the creditor by whom it was filed, after the issue of insolvency *vel non* has been argued and submitted for decision, but before the decision thereon has been pronounced, and to order it to be reinstated as a claim against the estate.

2. *Proof of payments by administrator.*—On the trial of an issue as to the insolvency of an intestate's estate, between the administrator and contesting creditors, the validity of payments made by the administrator not being strictly within the issue, the same fullness of proof is not required, as when those payments are presented for final adjudication on their merits; nor can the contesting creditors complain, on error, that the administrator was not required to prove those payments otherwise than by the production of the receipts, when the record shows that the ruling of the court, even if erroneous, was without injury to them, if not beneficial, by increasing the assets of the estate.
3. *Presumption in favor of ruling of primary court.*—In a case before the probate court, where the correctness of the ruling of the primary court depends on the proof, and the record does not purport to set out all the evidence on which the probate judge acted, the appellate court will presume that his decision was justified by the evidence.

APPEAL from the Probate Court of Dallas.

IN the matter of the estate of Walter R. Rand, deceased, on the trial of an issue of insolvency *vel non*, between the administrators and Wills & Hobbs, contesting creditors. The intestate died in June, 1864. Letters of administration on his estate were granted by said probate court, on the 14th November, 1864, to his widow, Mrs. Sarah C. Rand, who, in November, 1865, married James C. Taylor. On the 12th February, 1866, said Taylor and wife, as administrator and administratrix, reported the estate insolvent, and filed with their report schedules showing the assets and debts of the estate. The report of insolvency was contested by Wills & Hobbs, who had filed a claim against the estate, which was included in the schedule of debts filed by the administrators. The issue of insolvency *vel non* was tried before the probate judge, without the intervention of a jury, at the June term, 1866, of said probate court. On the trial of said issue, several exceptions were reserved by the contesting creditors to the rulings of the probate judge, which are now assigned as error. All the material facts,

relating to these several exceptions, are stated in the opinion of the court.

GEO. W. GAYLE, and WM. E. BOYD, for appellants.

ALEX. WHITE, *contra*.

JUDGE, J.—A claim against the estate of the decedent, for ninety thousand dollars, in favor of Bender & Waller, had been presented to the administrators, and included in their list of claims against the estate. The contesting creditors moved the court to reject this claim, on the ground of its invalidity as a charge against the estate; which motion was granted by the court. Subsequently, and after the issue as to the solvency or insolvency of the estate had been argued and submitted, but before any decision had been rendered, Bender & Waller, who were not contestants, moved the court for a re-hearing as to their claim; which motion the court granted, and, after receiving evidence in relation to it, reinstated it on the list. It is contended, that this action on the part of the court was erroneous.

It was certainly within the power of the court, at any time before a final decree had been rendered, and while the cause was under consideration, to retract an opinion, correct an error, or permit additional or explanatory evidence to be adduced, in relation to any matter legitimately connected with the issue before it. Such a power exists in all courts, and its judicious exercise is often indispensable to the attainment of justice; but, whether it should be exercised in any case, or not, is a matter of discretion with the court, under the particular circumstances of the case, and its exercise is not revisable on appeal.—*Donnell v. Jones*, 17 Ala. 689; *Winter v. Phelan*, 27 Ala. 649; *Floreay v. Florey*, 24 Ala. 241.

The fact that the re-hearing granted by the court was at the instance of persons not strictly parties to the contest, if an irregularity, is not a reversible error.

2. In "schedule A" of the report of the administrators, after stating the amount on hand in Confederate funds and securities, the administrators deduct therefrom the amount of ninety-two thousand dollars, as having been paid out by

them in Confederate currency, in the extinguishment of debts against the estate. The vouchers for these payments consisted of notes of the deceased, with receipts of payment to the administrators, and accounts verified by affidavit, with like receipts. The contestants insisted, that the administrators should be required to make proof of the payment of these notes and accounts, severally, other than the production of the receipts of payment, or that they should be required to make proof of the signatures to the receipts.

The issue in the proceeding was, the insolvency of the estate *vel non*; and the inquiry as to whether or not the administrators were entitled to the payments which they had made, in discharge of debts against the estate, was without the issue. In a proceeding like the present, it is not a proper office of the court, to make final adjudication upon the correctness or validity of claims or payments that may be incidentally involved; nor should the same strictness and fullness of proof as to their validity be required, as when they are up for final adjudication on their merits, in an appropriate proceeding for that purpose. As to the particular payments under consideration, we remark further, that the ruling of the court in relation to them was beneficial to the contestants, in this: If the payments were made in Confederate currency, a large amount of indebtedness against the estate was extinguished by the use of that which has since become worthless; consequently, the capacity of the estate for the payment of its remaining debts has been increased. If the court, then, erred in its ruling upon this question, it was error without injury.

3. An exception was taken to the ruling of the court, in refusing to require an alleged interest of the estate in a tract of land which had been purchased by the intestate from Bender & Waller, and which, it is contended, was the foundation of the claim against the estate for ninety thousand dollars, to be included in the schedule containing a description of lands belonging to the estate. If the estate owned any interest in this tract of land, it certainly should have been included in the schedule. Evidence was intro-

duced, showing a contract of purchase by the intestate from Bender & Waller, with stipulations on the part of the vendors to convey a title, upon conditions to be performed at a future day, and showing the value of the land; but the bill of exceptions does not purport to set out all the evidence, on which the probate judge acted in overruling the motion of the contestants as to this matter; and we must presume in favor of its correctness. The rule has been frequently announced, and acted upon by this court, that "in probate cases, where the correctness of the ruling of the primary court depends on the proof, and the record does not purport to set out all the evidence on which the probate judge acted, the appellate court will presume that his decision was justified by the evidence."—*Ward v. Cameron's Adm'rs*, 37 Ala. 691, and cases there cited.

The record does not purport to set out all the evidence on which the court acted in allowing the claims of Bender & Waller, of the estate of Davis, and of N. G. Rand; nor as to the matter of the exception relating to the allowance of claims against the estate, alleged to have been paid. Consequently, as to all these matters, we must presume in favor of the correctness of the rulings of the court below.

Some evidence is set out in the record, relative to the amount of corn, cotton, and fodder, on the plantation in the fall of 1864; but no action of the court was asked or had upon this evidence, so far as the record discloses, and there is no effective purpose for which we can consider it.

Decree affirmed.

BYRD, J., did not sit in this case, being interested as a creditor of the estate.

SHACKLEFORD vs. CUNNINGHAM.

[MOTION TO SUPERSEDE EXECUTION, AND ENTER SATISFACTION OF PROBATE DECREE.]

1. *Conclusiveness of probate decree.*—On motion to enter satisfaction of a probate decree, and to supersede an execution issued thereon, no matter can be brought forward, which is antecedent to, and involved in the decree.
2. *Payment and satisfaction of probate decree.*—A decree having been rendered against a guardian, on final settlement of his accounts, in January, 1864, for the balance ascertained to be then in his hands, as so much money, he can not have satisfaction of that decree entered, on proof that he paid the amount of the decree in Confederate States treasury-notes, to the probate judge, after the refusal of the ward to receive them, and took from said judge a receipt, which stated that the notes so paid were to be held by him "until the question is decided, whether S. D." [the ward] "is bound to take them or not."

APPEAL from the Probate Court of Macon.

THE record in this case shows, that, on the 11th day of January, 1864, W. R. Cunningham, as the guardian of Shadrach Dick, a minor, made a final settlement with said probate court of his accounts and vouchers as such guardian; and that a decree was thereupon rendered against him, by said probate court, in the following words: "This day having been set to hear and determine the matters as to the account heretofore filed by W. R. Cunningham, guardian of said minor, for a final settlement of his guardianship, now comes the said W. R. Cunningham, and moves the court that his accounts may be passed and allowed; and it appearing that due notice has been given, according to law, and in accordance with the order of the court, made and entered on the 3d day of December, 1863; and Littleberry Strange, who was heretofore appointed guardian *ad litem*, to protect the interests of said minor on this settlement, now comes, contesting said settlement; the court proceeded to hear the matters pertaining to said accounts.

Whereupon, it is shown by sufficient proof, that said guardian has received, of the assets of said minor, the sum of thirty-five hundred and fifty-two 17-100 dollars, and has justly expended, by way of costs and charges, and paying the just debts of said minor, the sum of five hundred and sixty-four 57-100 dollars ; leaving as a balance in the hands of said guardian the sum of twenty-nine hundred and eighty-seven 60-100 dollars ; and said account appearing to be in full, and correct, it is ordered and decreed by the court, [that the same] be, and it is hereby, passed and allowed as above stated, and that execution may issue for the amount so found in his hands."

On the same day on which this decree was rendered, John Shackleford was appointed guardian of said minor by said probate court; and on the 8th day of October, 1864, said Shackleford, as guardian, sued out an execution on said decree. Said Cunningham thereupon filed his petition, asking a *supersedeas* of said execution, and an entry of satisfaction of said decree. The petition alleged, as the basis of the relief prayed, that the funds in the hands of said Cunningham at the time of the rendition of said decree, for which said decree was rendered against him, consisted of treasury-notes of the Confederate States, which he had received in the legitimate discharge of his duties as guardian, as assets of the ward's estate ; and that on the day after the rendition of said decree, he had paid the amount to said probate judge, and taken from him a receipt, which was appended to the petition as an exhibit, and which was in the following words : "Received of W. R. Cunningham twenty-nine hundred and eighty-seven 60-100 dollars, in Confederate States treasury-notes, in full of a decree this day rendered in the probate court of Macon county against him, as guardian of Shadrach Dick, a minor; also, twenty-nine hundred and forty dollars, in Confederate States treasury-notes, in full of a decree rendered in said court on the same day against him, as the guardian of Meshach Dick, a minor ; of which minors John G. Shackleford is the guardian, and who refuses to receive said Confederate notes in payment of said decree; which notes I

am to hold, until the question whether he is bound to take them or not is decided."

The probate court overruled a demurrer to the petition, and, on the evidence adduced, rendered a decree for the petitioner, superseding and quashing the execution, and entering satisfaction of the decree; to which rulings and decree exceptions were reserved by said Shackleford, and he now assigns them as error.

CLOPTON & LIGON, for appellant.

GUNN & STRANGE, *contra*.

A. J. WALKER, C. J.—The judgment or decree of the probate court, upon a petition for *supersedeas*, or motion to enter satisfaction, is conclusive. No matter antecedent to the judgment, and involved in it, can be brought forward in support of such a motion.—*Watts v. Watts*, 37 Ala. 513; *Burt v. Hughes*, 11 Ala. 571; *Matthews v. Robinson*, 20 Ala. The proof that the assets in the hands of the appellee, as guardian, consisted of depreciated paper, lawfully received by him in the discharge of his duties, and that the same was on hand at the time of the settlement, might have justified him in asking, upon the payment of such money into court, for a discharge without judgment, or in asking, without such a payment, for a reduction of the amount of the decree, to the value of the depreciated paper. But, after the decree was rendered against him, the time for taking these defensive steps was past, unless he could bring himself within the rules of the chancery court, in reference to bills to set aside judgments. Therefore, so much of the allegations and proof as go to show that the decree was improperly rendered, may be dismissed from consideration.

[2.] The decree was for *money*. No other execution than for money could have issued on it. *Money*, as here used, imports a constitutional currency. The plaintiff, upon the rendition of the decree, had a right to payment in gold and silver, unless the law of congress, on the subject of legal-tender notes, has produced a modification of the rule. The decision in *Haynes v. Wheat & Fennell*, (9 Ala. 239,) is assailed, in other cases in this court, as an incorrect

exposition of the law. In this case, it is not necessary to pass upon the correctness of that decision, or to determine whether, even though considered wrong, it shall stand by aid of the doctrine of *stare decisis*; for, though yielding to that decision as authority, we should be compelled to hold that the decree here is not satisfied, for two reasons. The first of these two reasons is, that the probate judge did not receipt for money, but for Confederate treasury-notes, and did not so receipt for money, or return or enter satisfaction, as to render himself and sureties liable for constitutional money. The second is, that the receipt is, when properly construed, not absolute, but conditional, and bottomed upon the condition, that it should be decided that the plaintiff was bound to receive the Confederate treasury-notes; which condition is incapable of fulfillment, for it is firmly settled in the law, that a plaintiff in a judgment is not bound to take any thing but constitutional money in payment of his unconditional judgment.—*Haynes v. Wheat & Fennell*, *supra*; *West, Oliver & Co. v. Ball & Crommelin*, 12 Ala. 340; *Lyon & Noyes v. Cowles*, at the present term; *Griffin v. Thompson*, 2 Howard, 244; *Given v. Breedlove*, 2 Howard, U. S. 29; *McFarland v. Gwinn*, 4 How. 717.

In this case, there is present the further feature, that the Confederate money was paid in disregard of the previously given notification of the plaintiff, to the defendant, that Confederate treasury-notes would not be received, and to the probate judge not to receive them, and that they would not be accepted from him. Upon the legal effect of these facts, we do not find it necessary to pass, and we leave the question to which they give rise, open and undecided.

The decree of the court below is reversed, and a judgment is here rendered, that the petition of the defendant in the decree be dismissed, and his motion overruled; and he must pay the costs of the court below, and of this court.

BYRD, J.—I cannot yield my assent to the proposition, even for the sake of an argument, that the case of *Haynes v. Wheat & Fennell*, (9 Ala. 239,) is a correct exposition of the law, or that Confederate States treasury-notes are, or

were, money within any legal signification of the term. I consider the case above referred to as in antagonism to the overwhelming, if not uniform, current of adjudications and authorities, and that it stands as an odd obstruction in the channel of human justice, which ought to be removed at once and forever, and, *if it could be done*, leaving not a wreck behind, to mark the place where it stood.

I assent to the conclusion attained by the court, but not to all the reasoning contained in the opinion.

WINTER vs. COXE.

[ACTION ON PROMISSORY NOTE.]

1. *Construction and sufficiency of count on note.*—A count on a promissory note, which avers, that the plaintiff claims of the defendant the amount therein specified, “due by promissory note made by him, for the *Winter Iron Works*, payable at the office of the *Montgomery Insurance Company*, to the order of the defendant, and endorsed by said defendant; that the said *Winter Iron Works* are insolvent, and were insolvent at the time said note became due and payable,”—is against the defendant as endorser, and not as maker; and it is insufficient to charge him, because it does not show that his liability is to be determined by the commercial law, (since the court cannot judicially know that said insurance company is a banking-house,) and does not aver a sufficient excuse for the failure to sue the maker, if the note is not governed by the commercial law.
2. *Same.*—But a count, which avers, that the note was made by a corporation, “by said defendant as its agent,” payable at a banking-house, to the order of the defendant, and by him endorsed to the plaintiff; “and said note not being paid at maturity, the defendant had notice of the non-payment thereof,”—is good and sufficient, as a count against the endorser of a note governed by the commercial law.
3. *Same.*—A count, which avers, that the note was made by a corporation, “by said defendant as its agent,” payable at a banking-house, to the order of the defendant, and by him endorsed by the plaintiff; that the defendant “was the sole agent of said corporation at the maturity of said note, and no other person was authorized to pay said note for said corporation; wherefore plaintiff avers, that said defendant had due notice of the non-payment of said note at maturity,”—is not sufficient, as a count against the endorser of a note governed by the commercial

law, because it does not aver notice of non-payment, nor contain allegations which dispense with the necessity of notice.

4. *Notice of non-payment to endorser; excuse for failure to give.*—The insolvency of the maker at the time a note is given, or at the time it falls due, does not excuse the failure to give the endorser notice of non-payment at maturity.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. F. BUGBEE.

THIS action was brought by Richard Coxe, against Jos. S. Winter; was commenced on the 13th October, 1857; and was founded on a promissory note, of which the following is a copy.

"\$330.17. Montgomery, December 29, 1854. On the first day of January, 1856, we promise to pay, to the order of J. S. Winter, three hundred and thirty 17-100 dollars, value received, at the office of the *Montgomery Insurance Company*.

"For the WINTER IRON WORKS,
by J. S. WINTER, Agent."

The original complaint contained a single count, which was in these words: "The plaintiff claims of the defendant three hundred and thirty 17-100 dollars, due by promissory note made by him, for the *Winter Iron Works*, and dated on the 29th day of December, 1854, and payable January 1, 1856, at the office of the *Montgomery Insurance Company*. Said note is endorsed by defendant; and plaintiff avers, that the *Winter Iron Works* are insolvent, and were insolvent at the time said note became due and payable; said note being payable to the order of defendant."

The defendant craved oyer of the note, and demurred to the complaint, assigning the following causes of demurrer: "1st, that the complaint shows no legal grounds of action against this defendant; 2d, that said complaint is founded on the endorsement of a note payable in bank, or at a banking-house, and there is no averment of notice to the defendant of the non-payment of said note, or excuse given for such failure of notice; 3d, that the action is upon an endorsement of a promissory note, and there is no averment of suit against the maker, or excuse for failure to sue,

so as to bind the defendant to pay the same; 4th, that there was no presentment of said note, at the place where payable; and, 5th, that said note is the note of the *Winter Iron Works*, and not of the defendant." The court overruled the demurrer, and the defendant excepted.

The plaintiff then amended his complaint, by leave of the court, by adding the two following counts:

"2. The plaintiff claims of the defendant the further sum of three hundred and thirty 17-100 dollars, on a promissory note made by the *Winter Iron Works*, a corporation, by said defendant as its agent, on the 29th December, 1854, and payable on the 1st day of January, 1856, at the office of the *Montgomery Insurance Company*, a banking-house, to the order of the defendant, by whom said note was endorsed to the plaintiff; and the said note not being paid at maturity, the defendant had due notice of the non-payment thereof. The said note, with the interest thereon, is still unpaid.

"3. The plaintiff claims of the defendant the further sum of three hundred and thirty 17-100 dollars, on a promissory note made by the *Winter Iron Works*, a corporation, by said defendant as its agent, on the 29th December, 1854, and payable on the 1st January, 1856, at the office of the *Montgomery Insurance Company*, a banking-house, to the order of the defendant, by whom said note was endorsed to the plaintiff. The said note, with the interest thereon, is still unpaid; and plaintiff avers, that the defendant was the sole agent of said *Winter Iron Works* at the maturity of said note, and that no other person was authorized to pay said note for said *Winter Iron Works*. Wherefore plaintiff avers, that said defendant had due notice of the non-payment of said note at maturity."

The defendant demurred to each of these counts, assigning the same grounds of demurrer as to the first. The court overruled the demurrer, and held each count sufficient; to which exceptions were reserved by the defendant. An issue was then formed between the parties, and submitted to a jury; but the record does not show what pleas were filed. "On the trial," as the bill of exceptions states, "the plaintiff offered to read to the jury the note above set

out, to which the defendant objected ; which objection was overruled by the court, and the note was read to the jury ; to which the defendant excepted. The plaintiff then offered to read, from the records of the circuit court, several judgments against the *Winter Iron Works*, and to show, by the officers' returns, that said judgments remained unsatisfied ; said judgments and the returns of said executions being anterior to the maturity of said note. To this proof the defendant objected, as illegal and irrelevant ; but the court overruled the objections, and allowed the evidence to go to the jury ; to which the defendant excepted. The plaintiff then offered evidence to prove that, at and about the time of the maturity of said note, the said Joseph S. Winter, the defendant, was acting as the agent of said *Winter Iron Works* ; and the witness who made this evidence stated, also, that he knew of no other persons attending to the affairs of said corporation at the time last aforesaid ; which proof was objected to by the defendant, as illegal and irrelevant ; but the court overruled the objection, and allowed the evidence to go to the jury ; and the defendant excepted. This being all the proof, and there being no evidence offered of the presentation of said note for payment, at the place where it was payable, or of any protest for non-payment, or of any notice of non-payment to the defendant, (except as the same may be inferred from the above proof,) the court charged the jury, that, if they believed the evidence, they should find for the plaintiff the amount of said note, with interest ; to which charge the defendant excepted."

All the rulings of the court, to which, as above stated, exceptions were reserved by the defendant, are now assigned as error.

CHILTON & THORINGTON, for appellant.—1. The note being set out on oyer, it must be looked to in considering the sufficiency of the complaint on demurrer. The note, as set out, is the note of the corporation.—*Roney's Adm'r v. Winter*, 37 Ala. 277. The first count is against the defendant as maker, the additional words being mere surplusage, or matter of description, and not sufficient to show

that he signed the note as the agent of the corporation. If regarded as a count against an endorser, it is fatally defective, for want of an averment of presentation for payment at the place where it was payable, and notice of non-payment. The note is commercial paper, and governed by the law merchant.—*Milton v. De Yampert*, 3 Ala. 648; *Evans v. Gordon*, 8 Porter, 346; *Smith v. Strader*, 9 Porter, 446; *O'Hara v. Hawkinsville Bank*, 2 Ala. 367; *Pond v. Lockwood*, 8 Ala. 669; *Beal v. Wainwright*, 6 Ala. 156.

2. The averment of the insolvency of the corporation is no excuse for the failure to present the note for payment, and to give notice of non-payment to the endorser.—*Bishop v. Bradford*, 16 Ala. 769; *Brown & Sons v. Ferguson*, 4 Leigh, 37.

3. The second count is bad. The facts averred, as an excuse for not giving notice, may consist with the fact that the corporation had funds at the place of payment. Besides, this count avers, "that no other person" [than the defendant] "was authorized to pay said note for said" corporation; from which the inference legitimately follows, that it would have been paid, if it had been presented, and that it was not presented. The reason for demand and notice is, that the endorser may pay and take up the note, and then protect himself by suit against the maker. The averment of Winter's agency and authority to pay when the note matured, is a reason why the note should have been presented at the place of payment, and certainly affords no ground for charging him with its payment, two years after maturity, without such presentation.

4. The same principles apply to the rulings of the court on the evidence, and in the charge to the jury. The charge is objectionable, also, because it invaded the province of the jury.—*Henderson v. Mabry*, 13 Ala. 713; *Williams v. Slackelford*, 16 Ala. 318; *Carlisle v. Hill*, 16 Ala. 398.

WATTS & TROY, *contra*.—1. The note sued on was drawn by the defendant, as the agent of the corporation, payable to his own order. An agent cannot make a contract with himself. If he contracts in such a manner as not to bind his principal, he becomes individually responsible. The

note could have no legal effect whatever, until endorsed by the defendant ; the endorsement alone gives it validity, and makes him the real and legal maker of the note.—*Lea & Langdon v. Branch Bank at Mobile*, 8 Porter, 124 ; *Smith v. Strader*, 9 Porter, 446 ; *Murdock v. Caruthers*, 21 Ala. 785.

2. If the defendant was the maker of the note, no presentation for payment, or protest, or notice, was necessary to fix his liability.—*Evans v. Gordon*, 8 Porter, 142 ; *Sale v. Branch Bank at Decatur*, 1 Ala. 425 ; *Leigh v. Lightfoot*, 11 Ala. 935 ; Story on Promissory Notes, § 201, and notes ; *Smith & March v. Paull*, 8 Porter, 503 ; *Randolph v. Parish*, 9 Porter, 76.

3. As between the defendant and the corporation, there was no consideration ; and he was therefore liable without demand and notice of non-payment.—*Gee v. Williamson*, 1 Porter, 313 ; *Holman v. Whiting*, 19 Ala. 703.

4. The case of *Roney's Adm'r v. Winter*, cited for appellant, is unlike this case. In that case, the note was not payable to Winter's own order, and was not endorsed by him ; and the only question was, whether the face of the note showed, *prima facie*, that he was the maker.

5. A demand is not necessary to enable the holder to sue the maker of a note, even if it be payable at a bank, or other particular place.—*Evans v. Gordon*, *supra* ; *Montgomery v. Elliott*, 6 Ala. 701.

6. If Winter was the sole agent of the corporation, he knew that the note was not paid at maturity, and there was no necessity to present for payment. *Cessante ratione, cessat etiam lex*.

BYRD, J.—1. The counsel argue, that the first count is against the appellant as maker of the note. In our opinion, each count is against him as endorser thereof. We cannot take judicial notice of the fact, if it is one, that the *Montgomery Insurance Company*, or its office, was a banking-house within the meaning of sections 1525 and 1543 of the Code ; and the excuse alleged for non-compliance with the latter section is not one recognized by law.—Code, § 1546. The demurrer to the first count should have been sustained. There are authorities, as argued by the counsel for appel-

lee, which sustain the position, that, under certain circumstances, an endorser of a bill of exchange may be held liable as the maker of a promissory note ; but the complaint should so declare against him. Our system of pleading, under the Code, is a wide departure from the certainty and particularity required by the wisdom of the common law ; yet it preserves its distinctions, in the forms of complaints, between a drawer, or maker, and an endorser of a bill or note ; so that a complaint against a party as drawer will not authorize a judgment against him as acceptor or endorser of a bill, if the objection is made on the trial.

2. The second count of the complaint we are constrained to hold good, under the provisions of the Code. In this, and the third count, it is averred, substantially, that "the office of the *Montgomery Insurance Company*" is a banking-house. If it was, then, under section 1525 of the Code, the liabilities of the parties to the note sued on must be ascertained by the commercial law. An endorser of an inland bill of exchange is entitled to notice of non-payment at maturity ; but there is no necessity for protest, as in the case of a foreign bill, in order to fix his liability. It is averred in the second count, that the defendant had due notice of the non-payment of the note at maturity. This, with the other averments, was sufficient to charge him as an endorser.

3. Although it is averred in the third count, that "the defendant was, at the maturity of said note, the sole agent of said *Winter Iron Works*, and that no other person was authorized to pay said note for said *Winter Iron Works*;" yet that was not sufficient to relieve the plaintiff from the duty of giving notice to the endorser of the non-payment of the note ; and the subsequent averment, that he had notice thereof, is entirely predicated on the above recited allegation, and is a conclusion therefrom drawn by the pleader. The defendant may have been the sole agent of the *Winter Iron Works*, and no other person may have been authorized to pay the note ; but such allegations are not equivalent to an averment that the defendant was the sole agent to pay the note for the *Winter Iron Works*, and that the officers thereof were not authorized to do so, at maturity thereof.

4. The insolvency of the drawer of a bill, or maker of a note, at the time the bill or note was given or payable, is no excuse for not giving notice of the non-payment to the endorser at maturity. Such is the law in this country.—*Bank of America v. Petit*, 4 Dallas, 127—168; *Jackson v. Richards*, 2 Caines' R. 343; *May v. Coffin*, 4 Mass. 205; *Furman v. Fowle*, 12 Mass. 89; *Agan v. McManus*, 11 John. 189.

It does not appear from the bill of exceptions that the endorsement of the note by the defendant, if he ever endorsed the same, was given in evidence on the trial, nor that he had any notice of non-payment of the note at maturity; and the court therefore should not have given the charge it did to the jury. The proof did not authorize such a charge, *on the second count of the complaint*.

If the office of the *Montgomery Insurance Company* was a banking-house at the time the note was made, or if the act incorporating it should be given in evidence, then this case may hereafter turn upon principles different from those applicable to a promissory note not payable at a bank or banking-house; and upon the present record we will not attempt to lay down the principles governing either phase the case may assume. We intimate no opinion upon the question, whether the defendant, if he endorsed the note, may not be held liable thereon as a maker, upon principles of commercial law; nor upon that other question, whether he is not liable as a maker of the note, upon the signature thereto and the contents thereof. There being no count against him as the maker of the note, we do not think it proper, upon the present record, to pass upon those interesting questions.

Upon the questions of the duties and responsibilities of agents, the construction of the peculiar instrument sued on, and of the liabilities of the parties thereto, the following authorities may be consulted: *Story on Agency*, 144; *Story on Promissory Notes*, p. 70; 37 Ala. 277; *Edis v. Bury*, 6 B. & C. 433; 9 D. & R. 492; 2 Car. & P. 559; *Smith v. Strader*, 9 Porter, 446; *Mims v. Central Bank*,

2 Ala. 296; *Goggin v. Smith*, 35 Ala. 686; as also cases cited on briefs of counsel in this cause.

Judgment reversed, and cause remanded.

JUDGE, J., not sitting.

BROWN vs. BROWN'S ADM'RS.

[APPLICATION FOR SALE OF DECEDENT'S LANDS, FOR DIVISION.]

1. *Place of sale specified in order.*—Under the provisions of the Code, (§ § 1872, 1764,) and of the act approved November 19, 1853, amendatory of section 1764, (Session Acts, 1853-54, p. 252,) an order for the sale of a decedent's real estate, for division among the parties interested, must specify the place of sale; otherwise, no legal sale can be made under it.

APPEAL from the Probate Court of Tuskaloosa.

In the matter of the application of R. R. Brown and L. L. Brown, as administrators of the estate of John A. Brown, deceased, for an order to sell the real estate belonging to said decedent, for the purpose of making an equitable division among the heirs. The intestate died on the 29th March, 1866. The petition for the order of sale was filed on the 6th June, 1866, and was contested by N. H. Brown and the guardian *ad litem* of the infant heirs. On the hearing of the petition, at the November term, 1866, the probate court rendered the following decree: "This cause coming on to be heard, on the petition of the plaintiffs for a sale of certain real estate of John A. Brown, deceased, particularly described in said petition, for a more equal distribution thereof among the heirs of said decedent; and it appearing to the court that a guardian *ad litem* has been appointed for the minor heirs, who has denied in writing the allegations of the petition; and Newbern H. Brown, one of the heirs of full age, having denied the alle-

gations of said petition; and it also appearing that the notices to all the defendants have been duly served; and the matter having been submitted to the court, upon the petition, denial of its allegations, proof, and argument of counsel; and the court being satisfied that a sale of said lands is necessary for the equitable distribution thereof,—it is therefore ordered and decreed by the court, that the petitioners sell the said lands described in the petition as aforesaid, belonging to the estate of John A. Brown, for the purpose of an equitable division among the heirs; and that said sale shall be made after advertising the time, as now directed by statute, and they shall also be sold to the highest and best bidder therefor, on a credit of one and two years; and the said petitioners shall make due return to this court, how they have executed this order and decree.”

The decree of the court is now assigned as error.

W. MOODY, and E. A. POWELL, for appellants.

W. R. SMITH, *contra*.

JUDGE, J.—Lands ordered to be sold for distribution, must, under section 1872 of the Code, “be advertised, and conducted, and bonds taken for the purchase-money, if sold on a credit, with two sufficient securities; the sale confirmed, and titles made to the purchaser on the payment of the purchase money, in all respects, as upon a sale of lands by an executor or administrator, under an order of the probate court, for the payment of debts.” Turning to section 1764 of the Code, which relates to a sale of lands by an executor or administrator for the payment of debts, we find it as follows:—“The lands may be sold, on such credit as the court may direct, not exceeding two years; and they must be sold at the court-house of the county in which they lie; and the sale conducted in all respects as the sale of personal property.” By an act of the legislature, approved November 19, 1853, section 1764 of the Code, above quoted, was amended, so as to require sales of real property by executors, or administrators, to be held at “such place in the county as the judge of probate may in his discretion direct.”—Session Acts, 1853-’4, p. 252.

Thus it is perceived that no place in the county is now fixed by law, at which sales of real property by executors or administrators shall be held; but the place of every such sale, within the limits of the county, rests, under the law, in the discretion, exclusively, of the judge of probate. The decree of sale, in the case before us, does not direct the place of sale; no power exists in the administrators to select the place; consequently, no legal sale can be made under the decree, and it is therefore erroneous.

By not considering the other questions presented by the record, we must not be understood as impliedly expressing any opinion upon them. They may not again arise in the same form, and hence we do not consider them.

For the error above pointed out, the decree is reversed and the cause remanded.

CARTER vs. OWENS.

[ACTION ON PROMISSORY NOTE, BY ASSIGNEE AGAINST MAKER.]

1. *Division of decedent's estate by consent.*—The heirs-at-law and distributees of an intestate's estate may divide all the property among themselves by agreement, without any administration on the estate, if there are no debts, or if the debts have been paid; and in like manner, where there is a will, the parties interested, being adults, may divide the property among themselves by agreement, without probating the will; and the effect of such agreement and division, in each case, is to invest each distributee with a complete equitable title to the property allotted to him.
2. *Who is proper party plaintiff.*—A distributee of a decedent's estate, to whom a promissory note, assets of the estate, has been allotted as a part of his share, on a division of the estate by agreement among the parties interested, may maintain an action at law on it (Code, § 2129) in his own name.
3. *Wife's statutory separate estate; when wife may sue alone.*—A promissory note, assets of an intestate's estate, being allotted to one of the distrib-

utees who is a married woman, on a division of the estate by agreement among the parties interested, becomes a part of her statutory separate estate; and she may sue in her own name on it, (Code, § 2131,) without joining her husband.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN K. HENRY.

THIS action was brought by Mrs. Mary Carter, (who was described in the summons, and in the original complaint, as the wife of Augustus Carter,) against Thaddeus C. Owens, and was commenced on the 25th September, 1865. The amended complaint was in the following words: "The plaintiff claims of the defendant fifteen hundred and eight dollars, due by promissory note made by him on the 5th day of April, 1860, and payable to Rufus K. George, or bearer, on or before the first day of January next thereafter, with interest thereon. And plaintiff avers, that said Rufus K. George, the payee and owner of said note, died in the year 1862, in Monroe county, Alabama, leaving a last will and testament, which is in the words and figures following," setting it out. "And plaintiff avers, that said Rufus K. George left at his death no will, or instrument purporting to be such, other than the above, which has never been probated; that no administrator of his estate has ever been appointed; that all the debts due by said deceased at his death, and all the funeral and other expenses incurred in and about the management of his (said decedent's) estate, were paid up and fully discharged by the legatees mentioned in said will; after which, said legatees, three of whom, to-wit, said John H. George, Desdemona George, and plaintiff, were at the time of his death, and have been ever since, the sole distributees and heirs-at-law of said decedent, met, and distributed among themselves all the property of said decedent, according to the terms of said will; they all being present, and of full age, as were also plaintiff's husband and said Mary George, and all consenting and agreeing thereto; that the note sued on, which was the property of said deceased at his death, was handed and delivered on said distribution to her, said plaintiff, as

part of her distributive share of the estate of said decedent; and that she has ever since held, owned, and claimed the same, as her separate estate, under and by virtue of the statutes of Alabama, in such cases made and provided."

The will of said Rufus K. George, as set out in the complaint, was dated the 30th September, 1862, and attested by three subscribing witnesses. By its terms, the testator made substantially an equal division of his property, real and personal, among his widow, Mrs. Desdemona George, and his two children, John H. George and Mrs. Mary Carter; devising and bequeathing to each a tract or portion of land, certain slaves specified by name, "one third of all the notes" owing to him at the time of his death, &c.; and he also gave a slave to Mrs. Mary George, the wife of said John H. George. These were all the provisions contained in the will, except a direction for the payment of the testator's debts, and the appointment of his widow as his executrix.

The defendant demurred to the amended complaint, and assigned the following causes of demurrer: "1st, that the will of said Rufus George is subject to be called for by the probate court, and submitted to probate, and, until probated and the assent of representatives [given], no title to the note sued on passes to the plaintiff; 2d, that the facts set forth in said complaint show that plaintiff has no cause of action, and can not sue in her own name; 3d, that the estate of plaintiff not being an estate made separate by law, under the Code, even if she could sue at all, her husband must be joined; and, 4th, that the will, even if it confers title in the note on the plaintiff, without probate, and the appointment of a representative, does not make the bequest a separate estate, which authorizes the plaintiff to sue without joining her husband." "Thereupon," as the bill of exceptions states, "the court decided—1st, that the plaintiff had no such title to, or interest in the note, as would enable her to maintain this suit; and, 2d, that, if she had such right, the suit is improperly brought, and her husband ought to have been joined as a plaintiff with her." The court having therefore sustained the demurrer, the plaintiff

reserved an exception to its ruling, and took a nonsuit ; and she now assigns the ruling and judgment on the demurrer as error, and moves to set aside the nonsuit.

H. A. HERBERT, and R. M. WILLIAMSON, for appellant.
BENJ. F. PORTER, *contra*.

A. J. WALKER, C. J.—The complaint, to which a demurrer was sustained, shows that all the persons interested in a decedent's estate, as widow, heirs, distributees, legatees, or devisees, including the person appointed executrix by the will, and the husbands of *femes covert*, (all being adults,) by agreement divided among themselves all the property of the estate according to the direction of the will, paid off all debts against the estate, and delivered the note described to the plaintiff, as a part of her share ; and all this was done without probate of the will, or administration of the estate. The effect of such a division was to invest the plaintiff with an equitable title to the note. In the absence of the will, the decisions of this court, heretofore made, would meet every argument in favor of an opposite conclusion.—*Anderson v. Anderson*, 37 Ala. 683 ; *Marshall v. Crow*, 29 Ala. 278 ; *Vanderveer v. Alston*, 16 Ala. 494 ; *Miller v. Eatman*, 11 Ala. 609 ; 5 Ala. 308. Does the presence of an unprobated will, as a feature of this case, take it out of the principle of those decisions? We can perceive no sufficient reason why it should. All the parties interested, or to be affected, may as well by agreement divide property, where there is a will, without employing the agency of courts, as in case of intestacy. Parties, competent to act, ought to do that, without the agency of courts, which the courts would ultimately accomplish. To deny them the privilege of so doing, would manifest a judicial abhorrence of harmony. By the probate of the will, the claims of heirs and distributees, and of the widow, would have been subordinated to the directions of the will. This has been accomplished by agreement. There being no debts, the executrix would have had no other duty to perform, than to divide the property according to the will. This, too, has been done by agreement of competent parties. All the

ends and objects of judicial proceedings have been accomplished, by agreement of the parties; and that agreement must be effective.

It is admitted, that a will without probate is not evidence of title to personalty.—*Kinnebrew v. Kinnebrew*, 35 Ala. 628. But the plaintiff's title is not dependent upon the will. As long as the agreement remains unimpeached and undisturbed by the parties, her title is good, even though the will is void. Her title is the result of contract, and is good while the contract stands.

2. Section 2129 of the Code gives a right of action at law, upon a contract for the payment of money, "to the party *really interested, whether he have the legal title or not.*" Under this section, the plaintiff may sue, although holding only an equitable title.—*Hudson v. Weir*, 29 Ala. 294.

3. The note coming to the plaintiff was her *separate* property.—Code, § 1982. * It is made separate by law. The contract, or agreement, under which she received it, did not make it a separate estate. Her interest is, therefore, a statutory separate estate, and is, under section 2131 of the Code, the subject of suit in the name of the wife alone. *Pickens and Wife v. Oliver*, 29 Ala. 528. The instrument sued upon is a chose in action; and, therefore, a suit upon it does not fall in that class of cases, in which the husband may sue in his own name, he having had possession during the coverture, and the property being afterwards detained from him or converted.—*Pickens and Wife v. Oliver*, *supra*.

The nonsuit taken in the court below is set aside, the judgment reversed, and the cause remanded.

MYATTS & MOORE vs. BELL.

[ACTION ON PROMISSORY NOTE.]

1. *Verbal and written charges to jury.*—A charge to the jury, if asked verbally, should be refused, because the statute (Code, § 2355) requires that charges asked should be in writing; yet, when a charge, which asserts a correct legal proposition, is asked and refused, the appellate court will not presume that it was asked verbally, unless the record shows that it was refused on that ground.
2. *Acceptance of note in payment or discharge of debt.*—When a creditor takes a note from one of several joint debtors, he can not afterwards maintain an action against all of them, on the original indebtedness, without producing the note at the trial, if it is in his possession, and offering to surrender it; and this rule also applies, where the action is against several partners, and is founded on a promissory note executed by one of them, in the partnership name, after the dissolution of the partnership, in payment of a partnership debt.
3. *Authority of partner, after dissolution, to sign partnership name to note for partnership debt.*—After the dissolution of a partnership, one of the partners has no authority to bind the others, by signing the partnership name to a promissory note, even though such note may be given in renewal of a former note executed by the partnership; and the fact that, on the dissolution, he was authorized by the other partners to settle all the partnership business, does not change or affect this principle.
4. *Acceptance of note in payment or discharge of debt.*—The giving and accepting of a promissory note do not constitute a payment or discharge of the original indebtedness, unless there is an agreement to that effect; but, if there are any facts tending to show that it was received in payment, and the jury find that it was in fact so received, a recovery can not be had on the original debt.
5. *Statute of limitations; removal of bar by partial payment.*—A partial payment, by one of several joint debtors, before the statute of limitations has effected a bar, does not prevent the perfecting of the statutory bar as to the others; and this principle applies to a partial payment on a promissory note, executed by the partner who makes such payment, after the dissolution of the partnership, in the partnership name.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. W. D. BRAGG, as special judge, selected by the parties on account of the incompetency of the presiding judge.

THIS action was brought by William Bell, against Mark A. Myatt, John H. Myatt, and William T. Moore, as partners composing the firm of Myatts & Moore; was commenced on the 16th October, 1865; and was founded on a promissory note for seven thousand four hundred and seventy-six 65-100 dollars, executed in the name of said partnership, dated the 1st January, 1858, and payable to the order of the plaintiff, on the 1st January, 1859, with interest from date; on which note was endorsed a credit of five hundred dollars, paid by said W. T. Moore on the 1st November, 1859. The original complaint contained a single count, which was in the form prescribed by the Code, (p. 551,) for an action "by payee against maker"; but an additional count was afterwards filed, by leave of the court, which was as follows: "And the said plaintiff claims of the defendants the further sum of twenty thousand dollars, for which the defendants, as copartners as aforesaid, were indebted to the plaintiff, to-wit, on the 10th day of August, 1850, for that much money by the plaintiff before that time lent and advanced to the defendants, at their request, with interest thereon." A judgment by *nil dicit* was rendered against the defendant Moore. The other defendants separately pleaded, to the original complaint, special pleas of *non est factum*, averring that the note sued on was executed without authority from them, and was not binding on them; and to the amended complaint they separately pleaded, "in short by consent," the general issue, and the statute of limitations of six years. The plaintiff took issue on the pleas of *non est factum* and the general issue, and replied a subsequent promise to the plea of the statute of limitations; on which replication said defendants took issue.

The material facts of the case, as disclosed by the evidence adduced on the trial, were thus stated in the opinion of BYRD, J.—: "The evidence tended to establish the following facts: In 1841, or 1842, the appellants formed a mercantile partnership, which existed until the fall of 1856. In 1852 and 1853, the appellee, who was the plaintiff below, loaned money to the said partnership, and took their note for the amount; which note was afterwards renewed. The money so loaned, with interest to January, 1854.

amounted to five thousand five hundred and twenty-six 38-100 ; for which the partnership gave a note at that time. A partial settlement of the partnership was had in October, 1858 ; at which settlement said note was mentioned, and one of the Myatts insisted that it should be paid by Moore. On this settlement, Moore was authorized by the Myatts to close up and settle the unsettled business of the partnership ; and the books of the firm were left with said Moore, for the purpose of making collections, paying the liabilities of the firm, and closing up the business for a final settlement between the parties ; but said Moore was not in any manner authorized to make any new bills or notes, in the firm name, for any purpose whatever. The note sued on was executed by Moore in renewal of the firm note above mentioned, compounding the interest due thereon from year to year, up to the date of the note sued on ; and the plaintiff knew of the dissolution of the partnership, at the time this new note was executed."

On the trial, as the bill of exceptions shows, the plaintiff offered in evidence the note sued on ; and the court allowed it to go to the jury, "as evidence against said Moore alone." The bill of exceptions purports to set out all the evidence adduced on the trial, and then proceeds as follows : " Thereupon, the plaintiff's counsel stated to the court and jury, that, on the evidence, he did not claim any right of recovery against the Myatts, on the note sued on, but insisted that he was entitled to a recovery against them, as well as against Moore, under the common count."

"1. Said Myatts asked the court, in writing, to charge the jury, 'that if they believed, from the evidence, that the note for \$5,526.38, due in January, 1854, or 1855, was after its date, to the time of said partial settlement on the 8th October, 1858, the only liability of Myatts & Moore to Bell then existing, and that no payment was made on that liability, before the bar of the statute of limitations became complete, that is, before the expiration of six years from the maturity of said note, then the plaintiff could not recover of the Myatts in this suit.' The court gave this charge, but with the following qualification : 'that if said note was given for money loaned by plaintiff to said My-

atts & Moore, then their liability to plaintiff was the debt, or what they owed him for the loaned money, and the note was nothing more than evidence of that debt or liability; and that if they believed, from the evidence, that no payment was made on that debt or liability, before the bar of the statute became complete, then the plaintiff could not recover.' To this action, or ruling, and charge of the court, said Myatts excepted.

"2. Said Myatts then asked the court, verbally, to charge the jury, that if they believed, from the evidence, that said note for \$5,526.38 was the only liability of Myatts & Moore to the plaintiff existing at the time of the dissolution, and that the note sued on was made by said Moore, in the name of Myatts & Moore, after the dissolution of the firm, and that said payment of five hundred dollars was made and applied on the note sued on, that payment would not prevent the bar of the statute of limitations, as to the liability of the Myatts to plaintiff, from becoming complete at the expiration of six years from the maturity of said note for \$5,526.38. The court refused this charge, and said Myatts excepted.

"3. The court then charged the jury, that if they believed, from the evidence, that the plaintiff loaned money to Myatts & Moore, then the liability of Myatts & Moore to the plaintiff was their indebtedness to him, and that the note was only evidence of their indebtedness, and nothing else; and that if they believed, from the evidence, that said Moore was authorized by the Myatts, after the dissolution of their partnership, to pay that debt, and that the payment testified to was made on that indebtedness, before the bar became complete,—then the payment would prevent the bar of the statute from becoming complete, until six years after that payment was made. To this charge said Myatts excepted.

"4. Said Myatts then asked the court, verbally, to charge the jury, that if they believrd, from the evidence, that said note for \$5,526.38, due in January, 1854, or 1855, was existing at the time of said partial settlement on the 8th October, 1858, then, if the payment was not made and applied on that note, it would not continue the liability of the

Myatts to the plaintiff, or prevent the bar of the statute from becoming complete as to them, at the expiration of six years from the maturity of said note. The court refused to give this charge, and the said Myatts excepted.

"5. Said Myatts then asked the court to charge the jury, that if they believed, from the evidence, that said payment of five hundred dollars, which was proved to have been made, was made and applied on the note on which this suit was founded, it would not continue the liability of the Myatts, or prevent the completion of the bar of the statute as to them, and plaintiff could not recover of them in this suit; and that the jury could look to the credit entered on the back of the note sued on, as a part of the evidence, to enable them to determine whether or not it was so applied. The court refused to give this charge, and said Myatts excepted.

"6. Said Myatts then asked the court, verbally, to charge the jury, that if they believed, from the evidence, that the payment of five hundred dollars, which was proved to have been made, was made and applied on the note on which this suit was brought, it would not continue the liability of the Myatts, nor prevent the completion of the statutory bar as to them. The court refused to give this charge, and said Myatts excepted.

"7. The court then instructed the jury, that if the plaintiff loaned money to Myatts & Moore, they became indebted to him for that money, and their liability to him was their indebtedness to him; that if Moore was authorized by the Myatts, after the dissolution of said firm, to pay that debt, and the payment testified to was made on that indebtedness, before the lapse of six years from the time the debt matured, it prevented the completion of the bar at the expiration of the six years, and continued their liability; that if the payment was intended to be made on that liability, or that indebtedness, it made no difference where they found the evidence of that payment—whether on the note given for the debt, or on any other note, or on a piece of paper, or any where else; that a note was only evidence of the debt, and nothing else in the world. To this charge, also, the said Myatts excepted."

The charges given by the court, the refusals to charge as asked, and several rulings of the court on questions of evidence, (to which exceptions were reserved by said Myatts, but which require no special notice,) are now assigned as error.

VARY & JOHNSTON, and RICE, SEMPLE & GOLDTHWAITE, for appellants.—1. The note described in the original complaint was a new contract, made between new parties, and founded on a new consideration. It has all the elements of a valid contract, as between Bell and Moore, and is equally binding on each of them. The old contract was between Bell and the partnership, or artificial person, known as "Myatts & Moore"; while the new contract is between Bell and Moore individually. The consideration of the old contract was the money loaned by Bell to Myatts & Moore; the new contract is founded on the additional consideration of Bell's forbearance to sue until the maturity of the new note, and Moore's promise to pay compound interest, as therein included. The forbearance to sue was both a benefit to Moore, and a detriment to Bell, and was sufficient, of itself, to uphold the new contract.—*United States v. Astley*, 3 Wash. C. C. 512; and other authorities cited in *Parsons on Partnership*, 106-08, and note i. The promise to pay compound interest was legal, and not violative of the usury statutes. 23 Pick. Rep. 167. The new contract was certainly valid and binding on Moore individually.—*Clement v. Brush*, 3 Johns. Cases, 180.

2. What effect has the new contract on the rights and liabilities of the Myatts? In the first place, the new note is not binding on them, nor on the partnership.—*Lang v. Waring*, 17 Ala. 145; *Cunningham v. Bragg & Co.*, 37 Ala. 436; *Collyer on Partnership*, § 540, and note; *Parsons on Partnership*, 391, and authorities cited; 3 Kent's Com. (9th ed.) 72-3; *Payne v. State*, 39 Barbour, 634; 2 Comstock, 523; 1 Kernan, 176, 184. These authorities show, that the general authority given to Moore, on the dissolution, to settle the unfinished business of the firm, gave him no power to execute a new note in the partnership name, even in renewal of an old debt; and this rule should be strictly

applied here, where the new note includes a charge of compound interest. This point, however, was admitted by the plaintiff on the trial.

3. In the second, place, the new note discharged the Myatts, as well as Moore, from liability on the old debt. *Jolley v. Walker*, 26 Ala. 690, and authorities there cited; *Stone v. Chamberlain*, 20 Geo. 250; *Brewer v. Br. Bank at Montgomery*, 24 Ala. 440; *Abercrombie v. Moseley*, 9 Porter, 150; *Mooring v. Insurance Company*, 27 Ala. 258; *Washburn v. Pond*, 2 Allen, 474; *Setzer v. Coleman*, 32 Penn. St. 493; 34 Vermont, 115. If the new note has not this effect, then the case presents this singular feature—the plaintiff introduced the new note on the trial, and sought a recovery on it against Moore; while he seeks a recovery against the Myatts on the partnership debt, on which Moore is bound if the Myatts are. The law does not allow a creditor thus to proceed, at one and the same time, on a new and an old liability, one of which was given in discharge of the other. The acceptance of the new note from Moore, with notice of the dissolution of the firm, (which implies knowledge that he had no authority to bind the partnership by the new note,) the production of the new note at the trial, and insisting on it as the basis of the recovery against Moore, show at least an election by the plaintiff to claim the benefit of the new contract, and preclude him from a recovery on the old.—*Jackson v. Crawford*, 12 Serg. & Rawle, 165; *Hisa v. Lucas*, 14 ib. 209; *Firemen's Ins. Co. v. Cochran*, 27 Ala. 237.

4. If the new note did not discharge and extinguish the liability of the Myatts, the plaintiff could only have recovered against them, by producing the new note, and offering to surrender or cancel it.—*Mooring v. Insurance Company*, 27 Ala. 254. So far from surrendering, or offering to cancel the new note, the plaintiff asserted its validity, and based on it his right of recovery against Moore. And even if the new note were out of the way, the partnership note for \$5,526.38, which was not produced, nor in any manner accounted for, presented an insuperable obstacle to a recovery against the Myatts on the original partnership debt for money loaned.

5. A recovery on the original partnership debt was barred by the statute of limitations. The payment of five hundred dollars by Moore, after the dissolution of the partnership, even if intended and accepted as a payment on the original partnership debt, could not have the effect of preventing or removing the statutory bar as to the Myatts.—*Wilson v. Torbert*, 3 Stewart, 296-305; *Payne v. State*, 39 Barb. 634; 2 Comstock, 523; 1 Kernan, 176; 3 Kent's Com. (9th ed.) 72-3; *Lowther v. Chappell*, 8 Ala. 353; Angell on Limitations, § 260. But the payment was actually made and applied on the new note, both parties concurring in that application; and for this reason, also, could have no effect in continuing or reviving the liability of the Myatts.

WM. M. BROOKS, *contra*.—1. The charges which were asked verbally, were properly refused on that account.—Code, § 2355. The 5th charge asked and refused, is not shown to have been reduced to writing; and if it be held to assert a correct legal proposition, it must be presumed to have been refused because it was not in writing, since that presumption is necessary to sustain the judgment.

2. The giving of the new note by Moore, in the name of the partnership, was not a payment of the pre-existing debt, unless there was an agreement so to receive it.—*Ficklin v. Brewer*, 38 Ala. 685; *McCreary v. Carrington*, 35 Ala. 700; *Dorrance v. Jones*, 27 Ala. 630; *Mooring v. Insurance Company*, 27 Ala. 258; *Chastain v. Johnson*, 2 Bailey, 574. Even if there had been such an agreement in this case, it would not have been binding, inasmuch as the Myatts were not bound on the new note; and the plaintiff was entitled to recover on the original indebtedness.—*Spear v. Atkinson*, 1 Iredell, 262; *Muldon v. Whitlock*, 1 Cowen, 290; *Cole v. Sackett*, 1 Hill, 516; *Waydell v. Luce*, 5 Hill, 448. If the plaintiff had agreed to take the new note on the firm, in payment of the old debt, and the Myatts were not bound on the new note, it would be a fraud on the plaintiff to hold him bound by the agreement.—*Smith v. Rogers*, 17 Johns. 340; *Morgan v. Bitzenberger*, 3 Gill, 350; *Gough v. Davis*, 4 Price, 200; *David v. Ellis*, 5 Barn. & Cr. 196; 7 D. & R. 690. There was no intention to discharge the Myatts from

liability, for the partnership name was signed to the new note. It was simply an abortive effort to renew and extend an old debt, under the mistaken belief, on the part of Bell and Moore, that they had the right and power to do so. To hold that Bell can not recover on the old debt, because it was paid by the new note, and can not recover on the new note, because Moore had no authority to sign the partnership name, would present a strange anomaly in the law.

3. As to the necessity of producing and surrendering the note: The old partnership note was surrendered to Moore, when he executed the new note. The new note was produced on the trial, and, being sued on, was effectually extinguished for all purposes, and could never be used again. This was sufficient to satisfy the most stringent rule.—*Mooring v. Insurance Company*, 27 Ala. 258.

4. On the dissolution of the partnership, Moore was authorized by the Myatts to close up the unsettled business, and was particularly instructed to pay the plaintiff's debt. Authority to make full payment, includes authority to make a partial payment. If the assêts of the partnership had been placed, on the dissolution, in the hands of a disinterested third person, as agent, with instructions to make collections and pay the debt, it can not be doubted that a partial payment by such agent would be effectual to prevent or remove the statutory bar as to all the partners; and the partial payment by Moore, under the facts proved, can not be less efficacious.—*Angell on Limitations*, 287; *Parsons on Partnership*, 184-93, 302; *Burt v. Palmer*, 5 Esp. 145; *Smith v. Ludlow*, 6 Johns. 267.

BYRD, J.—(After stating the facts as above.) The evidence tended to prove other facts, and, to some extent, to oppugn those above stated. But, we have set forth as many of the facts which the evidence tended to prove, as we conceive necessary for the determination of the questions raised by the charges given and those refused by the court.

1. The charges verbally asked, and refused by the court, were properly refused, as they were not in writing, as required by section 2355 of the Code. This disposes of the

charges numbered 2, 4, and 6. No. 5 does not appear on its face, or otherwise, to have been "in writing," or verbal. In such a case, we hold, that the charge will be presumed to have been in writing, where no objection appears to have been taken to it in the court below; and the objection can not be raised for the first time in this court.

2. The charges asked and given must be construed with reference to the evidence; and if there is any evidence upon which a charge asked can be based, if it is a correct principle of law, it should be given. The law seems to be settled, in this court, that a party who takes a note of one of several joint debtors, can not maintain an action against *all of them*, on the original indebtedness, without producing the note, if in his possession, and *offering* to surrender it on the trial.—*Mooring v. Mobile Marine Dock & Mutual Ins. Co.*, 27 Ala. 258, and authorities cited therein. The law will not allow the creditor to hold a note against a joint debtor, and, at the same time, recover a judgment against him on the consideration of the note. And we see no reason why this rule should not apply to parties who deny the execution of the note by an appropriate plea, as well as to a party who does not put in issue the execution of the note. But, however this may be, we proceed to other questions of law involved in the cause, which, with the authorities referred to, will aid the court in disposing of this cause on another trial.

3. The agreement of all the partners, that one of them shall wind up the business after the dissolution, while the others have nothing to do with it, confines the power to the one designated, but does not *enlarge* his power, and confers no more power than the partner would have by the general principles of the law of partnership.—*Parsons on Partnership*, 388, *et seq.*; and authorities there cited. The authority, therefore, which the Myatts may have given Moore, to wind up the business, and to pay the debt due to the appellee, conferred on him no more or greater authority, as to that debt, than he had by the law; and therefore his acts, as to that debt, must be tested by the general principles of the law of partnerships. By that law, one partner, after the dissolution of the firm, has no authority in law to

renew a promissory note made by the partnership, by signing the partnership name, and thereby bind the partners; but it would be the note of the partner executing it, and binding on him.—*Cunningham v. Bragg*, 37 Ala. 436, and authorities cited; Parsons on Partnership, 391, and references *t* and *u*. And especially in a case like this, where the partner executing the note has included therein compound interest.

4. The general doctrine is, that the mere giving of a note for a debt is not a discharge or payment of the debt; and the note may be surrendered, and a recovery had on the debt. But, if there are any facts tending to show that the note, even when given by one of several joint debtors, was received in payment of the debt, then it becomes a question for the jury to determine, whether it was so received; and if they find that it was, then no action can be maintained on the debt.—*Lee's Adm'r v. Fountain & Freeman*, 10 Ala. 755, and authorities cited therein.

5. The defendant Moore made a payment on the note which he gave, and on which he alone was personally liable; which payment did not amount to the interest due on the note at the time the payment was made; and there being no application of the payment to the original debt by the parties, the statute applied the payment to the interest due on the note given by Moore.—Code, § 1522. Such a payment can not, as a matter of law, be considered a promise on the part of the Myatts to pay the original indebtedness due to the appellee from the partnership, so as to relieve the case from the bar of the statute of limitations of six years, as to the original cause of action, although the payment may have been made by Moore within six years before the suit was brought. The appellee, by introducing the note given by Moore, and by endorsing the payment thereon, and claiming it on that note, without offering to credit it on the original debt, shows that he insists on the note as valid, at least against Moore, and that he claims the payment on that note, which includes compound interest; and thereby attempts to get the benefit of the payment on the note of Moore, and at the same time use it as evidence to remove the statutory bar as to the Myatts on

the original debt. Such an operation is not tolerated by any principle of law of which we are aware.

A payment by one of several joint debtors, before the statute has completed a bar, will not prevent the completion of the bar as to the others, at the expiration of the time within which the statute required suit to be brought on the original evidence of debt, relied upon to sustain the action. *Lowther v. Chappell*, 8 Ala. 353, and authorities cited; *Angell on Limitations*, § 260, and note 4. Nor can one partner, after the dissolution of the partnership, by a payment made on a partnership liability, and before the statute has perfected a bar, affect the running of the statutory bar in favor of the other partners, but can only affect it as to himself.—See authorities above cited. We see no reason why partners, after a dissolution, should be held to a different rule than that applicable to other joint debtors.

We have laid down some general principles for the guidance of the court on another trial, without noticing each of the charges given and refused by the court. But the charge numbered 5, asked by the appellants who have assigned error, and refused by the court, is in harmony with the principles herein laid down, and should have been given. And so far as any charge given may be in conflict with this opinion, it is erroneous.

On all the questions of law herein stated, see the authorities cited in the briefs of the learned counsel on both sides.

For the refusal of the court to give the 5th charge, the judgment of the court below must be reversed, and the cause remanded.

BEASLEY AND WIFE *vs.* WATSON.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Admissibility of guardian's declaration, as part of res gestæ.*—The declaration of a guardian, made at the time of lending out money in his hands, that it belonged to his ward's estate, is competent evidence for him, on settlement of his accounts, as tending to prove that fact.
2. *Admissibility of parol evidence to explain certificate of deposit.*—When a certificate of deposit has been taken by a guardian in his own name, parol evidence is admissible to show that the funds deposited belonged in fact to the estate of his ward; and that fact being shown by parol, the certificate is admissible evidence for him, in connection therewith, to prove the investment.
3. *Investment by guardian in Confederate States bonds.*—A guardian is entitled to a credit, on final settlement of his accounts, for the amount of money belonging to his ward's estate, which he had invested, in good faith, in Confederate States bonds, under the authority conferred by the act approved November 9, 1861; and his failure to report such investment to the probate court within sixty days, as required by the fourth section of said act, does not deprive him of the right to a credit for such investment, when it is not shown that injury resulted to the ward's estate from such failure; nor is his failure to charge himself in his account-current, as at first made out, with usurious interest collected on a loan of his ward's money, sufficient proof of a general fraudulent intent on his part in the management of the estate, to deprive him of the right to such credit on the ground of bad faith. (BYRD, J., *dissenting.*)
4. *Allowance to guardian, for board paid to ward's father.*—Where a father is not able to support and educate his children, during their minority, in a manner suitable to their circumstances in life, an allowance will be made to him, for that purpose, out of a child's private estate; and where board is paid to the father, by the child's guardian, the guardian will be allowed a credit for the amount so paid, if reasonable, on proof that it was demanded by the father, and that the father's circumstances justified the demand.

APPEAL from the Probate Court of Barbour.

IN the matter of the final settlement of the accounts and vouchers of John Watson, as guardian of Jane A. Beasley, (late Williams,) wife of William Beasley. The guardian's account was filed for settlement in September, 1865; and the settlement was made in November, 1866, when the fol-

lowing bill of exceptions was reserved by said Beasley and wife :

"On the trial of this cause, it was proved that said guardian received from Thomas Robinson, the former guardian of said ward, the sum of four hundred and twenty 44-100 dollars on the 24th January, 1860, and the further sum of five hundred and three 75-100 dollars on the 15th December, 1860 ; and that these sums of money were in par funds, being bills of the Eastern Bank of Alabama at Eufaula, and embraced all the estate of said ward. It was proved, also, by Jonathan Thomas, a witness for said guardian, that about the 1st January, 1861, said Watson loaned him nine hundred dollars, in bills of the Eastern Bank, which at that time were at par with gold, and took from him a promissory note therefor, payable to said Watson, as guardian, twelve months after date, at fifteen per cent. interest. Said Watson was at that time, and still is, guardian for said Jane Williams, and for her sister, Columbiana Williams. Said witness testified, that said note was payable to said Watson as guardian ; but he did not recollect whether it was made payable to him as the guardian of both wards, or of one only ; and if only one, he could not remember which one. Said note, being destroyed, could not be produced. Said witness proved, also, that said Watson, at the time he loaned him said nine hundred dollars, stated that it was the money of his said wards, but did not state how much of it belonged to each. Before the introduction of this proof, said ward, by her attorneys, objected to that portion of it which stated the declarations of said John Watson, on the ground that it was inadmissible ; but the court overruled the objection, and admitted said declarations as proof ; to which the said ward excepted.

"It was proved by said witness, also, that he renewed the note for the loan of said money, in the early part of 1862, and made a new note, payable to said Watson individually, and not as guardian, and paid twelve and a half per cent. interest for this year, the note falling due the 1st January, 1863 ; and that in the early part of 1864, a short while before 'funding time,' he paid to said Watson the amount of said note, with interest at the rate stated, in

treasury-notes of the Confederate States. In his return for this final settlement, (it being the first settlement made after lending said money to said Jonathan Thomas,) said guardian charged himself with only eight per cent. interest on the amount so loaned out. After it was disclosed in evidence, by said Thomas, that he had paid said guardian the extra interest on said loaned money, the guardian moved the court to allow him to amend his return, so as to embrace said extra interest in his account; which was allowed, without objection. When said guardian offered to account for said extra interest, it was considered as done by consent, without any formal amendment.

"Said guardian stated, in his return, that soon after he received said Confederate States treasury-notes from said Thomas, (four hundred and fifty dollars of which, he stated in his return, belonged to his said ward, Jane Williams,) he funded the same in Confederate States four-per-cent. bonds; in proof of which allegation, he offered in evidence a paper writing, which was the only proof on this subject' and of which the following is a copy." (The paper here set out is a certificate, signed by the depositary of the Confederate States, at Eufaula, dated the 5th March, 1864, acknowledging the deposit of nine hundred dollars in his office by John Watson; "for which amount," it states, registered bonds of the Confederate States of America, bearing interest at the rate of four per cent. *per annum*, from this date, will be issued to him, under the 'act to reduce the currency, and authorize new issue of notes and bonds,' approved February 17, 1864, upon the surrender of this certificate at this office.") "The said ward objected to the introduction of this paper, on the ground of its inadmissibility; but the court overruled the objection, and allowed the paper to be read in evidence, and considered by the court in making up its decision; to which the said ward excepted.

"It was in proof, also, that said guardian paid to William Williams, the father of said ward, on the 30th January, 1861, the sum of seventy-two dollars, for the board of said ward for the year 1860; also, seventy-two dollars in Confederate States treasury-notes, on the 25th March, 1862, the board of said ward for the year 1861; and eighty-four

dollars, in Confederate States treasury-notes, on the 8th January, 1863, for the board of said ward for the year 1862. Said William Williams testified, as a witness on the part of said ward, that said ward was a minor, during all the time for which board was charged and paid as aforesaid, and resided with him; that he was a widower, and had only five children, said ward being the eldest of them; that he was well able to maintain and educate his children, independent of their own estate, in a manner suitable to their condition and circumstances in life; that he owned several hundred acres of valuable land, (though he owed the purchase-money therefor,) and owned nine negroes, being a woman and her eight children, none of whom were able to work except the two oldest, and they could do but little; that he also had plantation stock, farming implements, wagons, &c., and was worth, from the date of the first charge for board, up to the close of the war, ten thousand dollars above all liabilities. It was thereupon proved by the said guardian, that said board was charged by said William Williams, and demanded of him by said Williams, and also of his predecessor in the guardianship, and was paid under the direction of the probate court. It was proved, also, that said ward was furnished by her guardian with the means of purchasing most of her clothing, and other necessities, including tuition, and that her father had furnished but little; also, that her father's circumstances were limited, during the whole of the time for which said board was charged; that he had never been regarded as a thrifty man; that he was a farmer, was about fifty years old, and had no other means than above stated. Besides the items for board, above mentioned as having been paid in Confederate States treasury-notes, the guardian paid out for the ward's use, in Confederate treasury-notes, at the dates specified, the following sums of money, all of which were put on the credit side of his account, at their full amounts—that is to say: 'August 28, 1863, cash advanced to ward, \$15. 75'; 'January 18, 1864, same, \$14.00'; 'January 2, 1864, same, \$10.00, and making pair of shoes, \$4.00'; 'August 2 1864, leather, and making pair of shoes, \$23.00'; 'October 7, 1864, cash advanced to ward, \$12.00';

'December 1, 1864, same, \$6.00'; 'March 18, 1865, same, \$10.00'.

"It was proved, also, that said guardian was a farmer, in moderate circumstances, and had no money of his own to lend; that he was guardian for none others than these wards, and had no other estate in his hands; that he was a soldier in the service of the Confederate States, from 1863, until the close of the war, and was absent in the service nearly all the time, but was at home a short time, on furlough, when said alleged funding took place; and that he was a man of but little intelligence. Said guardian moved the court to allow a further amendment of his return, in this—that he would make oath that he had not himself used, or loaned, or otherwise disposed of the said moneys which he had received as belonging to his ward's estate' which amendment was allowed, without objection, but subject to legal exception as proof, which, as the ward insisted, was no evidence at all.

"This being all the proof in respect to any contested item, as to which a reversal is sought in the supreme court, the court thereupon decided—

"1. That the four hundred and fifty dollars, alleged by the guardian to have been funded for the ward, and with the ward's money, was so funded in fact, and that the guardian was entitled to a credit to that extent; and that whether the ward's money was funded in said four-per-cent. certificates or not, it having been made to appear, to the satisfaction of the court, that it was received by the guardian, about February, 1864, in Confederate treasury-notes, it became valueless as the property of the ward, and the guardian was not accountable for its loss, and should be allowed a credit for it for this reason also.

"2. That the several items of board paid to said William Williams, as above stated, were proper and legal charges against the ward, and should go to the credit of the guardian, to their full amount, and ought not to be scaled under the ordinance of the State convention.

"3. That the said sums of money paid out, in Confederate treasury-notes, in payment of said items of board, as well as those paid out for the ward's use otherwise, as

herein above specified, should not be sealed, but allowed and credited to the guardian at their full amount."

The several rulings of the probate court, to which, as above stated, exceptions were reserved by the ward, are now assigned as error.

RICE, SEMPLE & GOLDTHWAITE, for appellants.

JUDGE, J.—It was one of the guardian's ordinary duties, to invest the surplus funds of his ward, and make interest thereon, if practicable.—Code, § 2024; *Allen v. Martin*, 36 Ala. 330. We think it sufficiently appears, from the evidence adduced on the final settlement, that the nine hundred dollars loaned by the guardian to Jonathan Thomas, belonged to the estates of his two wards, Jane and Columbiana Williams. The guardian so declared at the time of the loan; and this declaration, accompanying the act, and explanatory of it, was competent evidence as a part of the act itself. The truth of the declaration is shown by the fact, that the note taken at the time for the money loaned was made payable to the appellee as guardian, who, as the evidence showed, was guardian for none other than the wards named, was a farmer in moderate circumstances, and had no money of his own to lend.

2. The money due on this note was collected by the guardian, after one renewal thereof, in Confederate States treasury-notes. It was collected "in the early part of 1864;" and on the fifth of March of the same year, nine hundred dollars of the same currency were deposited by the guardian in the Confederate States "Depository Office," at Eufaula, to be funded in Confederate States four-percent. bonds. A certificate of deposit was taken by the guardian in his own name as an individual, and not as guardian. This certificate, we think, the court properly received as evidence. The facts in evidence, in the absence of countervailing proof, authorized the conclusion, that the currency deposited for the certificate, belonged, not to the guardian, but to his two wards; and this it was competent to show by parol evidence, in connection with the certificate.

Bank v. Coleman, 20 Ala. 140; *McTyler v. Steele*, 26 Ala. 487; *McGuire v. Russell*, at the present term.

3. The failure of the guardian to report the four-percent. certificate to the court within sixty days after it had been received, in conformity to the requirements of the statute, even if no sufficient excuse existed for the failure, furnishes no predicate for a charge against the guardian on account thereof, unless the ward's estate was injured thereby, which does not appear. This point was expressly so ruled by this court, in *Dockery v. McDowell*, at the January term, 1867. The circumstance of his failure to charge himself, in his account as first made out, with the usurious interest he had collected on the loan of the money of his ward, was not evidence of a general fraudulent intent in his management of the estate. This omission may have been the result of inadvertence, especially as the evidence shows he was a man of but little intelligence. On the authority of several adjudicated cases of this court, made at the last term, we hold that the probate court committed no error in allowing the credit for one half of the four-percent. certificate; the other half being the property of the other ward of the guardian. In *Watson and Wife v. Stone*, decided at the January term, 1867, this subject is fully considered, and elaborately discussed. See also, *Dockery v. McDowell*, and *Neilson v. Cook*, decided at the same term. Whether the Confederate States treasury-notes, with which the certificate was procured, were funded for the benefit of the ward's estate or not, still, being property of her estate, if they had been retained by the guardian, they would have been as valueless as the certificates; and as the court below properly decided, the guardian should not have been charged therewith.

4. A father is bound, by the common law, to support and educate his children during their minority; but, when he has not the ability to do so, according to their station in life, assistance will be granted him from the private estate of the children.—*Watts v. Steele*, 19 Ala. 656; *Pharis v. Leachman*, 20 Ala. 662; *Alston v. Alston*, 34 Ala. 15. In the case last cited it was held, that in determining the question of the father's ability, it is proper to consider the

amount of his estate, the number of his children, the condition of his family, his expenses and income, and the amount of his children's fortune.

It appears from the record in this case, that the father testified, as a witness for the ward, that he was well able to maintain and educate his children, independent of their own estate, in a manner suitable to their condition and circumstances in life, during the whole of the time for which board was paid him by the guardian. But, notwithstanding this conclusion of the witness, as to his ability to support and educate his children, the character of the property constituting his estate, as described by himself, shows that his income could not have been otherwise than very limited ; and his necessities, doubtless, prompted him to demand payment for the board of the ward, as he was proved to have done. He had a large family of white and black children together, who were unable to contribute much, if anything, towards their own support ; and considering the amount of the ward's estate at the time, we think it just and equitable that it should have been charged, to some extent, with her own maintenance and support. We cannot say the effect of the rulings of the probate court, on this question, was to charge her estate, for this purpose, to a greater extent, than was proper under all the circumstances ; and the action of the court, in allowing the credits referred to, comes, we think, within the rule laid down on the subject in the case of *Alston v. Alston, supra*.

Decree affirmed.

BYRD, J., dissented on the question decided as to the allowance of the credit on account of the four-per-cent certificate, and declared that he would hereafter give the reasons for his dissent, in some case now before the court.

HALL, MOSES & ROBERTS *vs.* HEYDON.

[GARNISHMENT ON JUDGMENT.]

1. *Validity of mortgage as against creditors.*—A mortgage, which is executed with the avowed intent on the part of the mortgagor to prevent a levy on the property by his judgment creditors, and accepted by the mortgagee with knowledge of that intent, and which purports to secure a debt partly simulated, is fraudulent and void as against creditors.
2. *Liability of trustee or mortgagee as garnishee.*—Section 2523 of the Code, relative to the liability of trustees to process of garnishment, equally applies to mortgagees with power of sale; and under its provisions, if such trustee or mortgagee is guilty of actual fraud, (as by accepting the deed with knowledge of a fraudulent intent on the part of the grantor or mortgagor,) he cannot, as against an attaching creditor, retain out of the assets the amount of a debt due to himself.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JOHN K. HENRY.

THE appellants in this case recovered a judgment against Mary Keiffer, at the October term of said circuit court, 1857, for five hundred and thirty-eight 21-100 dollars damages, besides costs; and an execution on this judgment having been returned "no property found," they sued out process of garnishment on the 2d March, 1859, and summoned James Heydon as the debtor of said Mary Keiffer. The garnishee appeared, and, at the April term, 1861, answered orally, in open court, as follows: "In 1855, or 1856, said defendant owed him two or three hundred dollars, for groceries previously sold her, and a note for three hundred dollars, given for the hire of a slave, to work in a blacksmith-shop, which was carried on by the defendant; and he was surety for her on another note for about three hundred dollars, to one Thomas M. Williams, for the hire of another slave to work in the same shop. He took possession of said blacksmith-shop, with the consent of said defendant, in January or February of the same year, and carried on the same with the work of said slaves during

said year, and received the proceeds thereof; out of which at the end of the year, said two notes were paid, and cancelled. In the same year, and after he took said shop under his control, the defendant came to him, and told him that she wanted to make him a mortgage upon a house and lot, which she owned, in the village where they both lived, worth one thousand or fifteen hundred dollars, for the purpose of preventing some of her execution creditors from levying their executions on it, and subjecting it to the payment of their debts. Said garnishee further stated, that he expected said defendant would purchase other groceries from him, and had in anticipation the securing of such other purchases, and expected to secure them by the execution of said proposed mortgage, and agreed to take the mortgage; that said defendant then executed to him a note for — dollars, and gave him a mortgage to secure the same, and he took said mortgage for the purpose of securing said debts; that after said mortgage was made, and during said year, he furnished additional groceries to the defendant, to an amount more than sufficient, after deducting all credits of the defendant, to cover the consideration expressed in said mortgage, a part of which consisted of supplies for said slaves, who were kept at the defendant's house, he furnishing a woman to cook for them; that the amount of groceries furnished, after deducting for said negroes, was more than the amount expressed in said mortgage; that some time after the law-day of said mortgage, and before the service of the garnishment in this cause, he sold said house and lot under said mortgage, and bid in the same at the sale, for the sum of five or six hundred dollars, he could not remember which.

“This was all the answer of the garnishee. The evidence further showed, that said house and lot were subsequently sold, under a decree in chancery, at the suit of Barney & Brothers; and that said defendant is now living there. It was admitted, that the plaintiffs' debt was contracted on the 28th March, 1855; on which suit was brought on the 24th September, 1857, and judgment rendered at the fall term of said court, 1857.” A copy of the mortgage is set out in the bill of exceptions; but it is not stated to have been

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read in evidence, or made part of the garnishee's answer. The mortgage is dated the 10th October, 1855; purports to be given to secure the payment of a note for five hundred dollars, of even date with it, and due the 1st January, 1856; and contains a power of sale on default being made in the payment of the note at maturity.

"The plaintiffs moved the court for a judgment against said garnishee—1st, for the amount of their judgment aforesaid, with costs of suit; 2d, for the amount for which said house and lot were bid in by said garnishee, at his sale under said mortgage; and, 3d, for the amount for which said house and lot were bid in by said garnishee, less the amount of the defendant's debt to the garnishee at the execution of said mortgage which was unpaid at the time of the sale." The court refused each of these motions successively, and discharged the garnishee; to which several rulings and decisions exceptions were reserved by the plaintiffs, and they are now assigned as error.

WATTS & TROY, for appellants.

J. F. CLEMENTS, *contra*.

A. J. WALKER, C. J.—The mortgage executed by Mary Keiffer, the judgment debtor of the appellants, to the defendant in garnishment, was fraudulent. The defendant in the judgment was indebted to the garnishee, in the sum of two or three hundred dollars, for groceries, and in a note for three hundred dollars; and the garnishee was surety for such defendant, on a note for about three hundred dollars. During the year 1855, the two notes above named were paid off by the income of the defendant's blacksmith-shop, which the garnishee received; and at the end of the year the two notes were cancelled. In October of the same year, the defendant informed the garnishee, that she desired to make to him a mortgage on her house and lot, worth \$1,000 or \$1,500, for the purpose of preventing some execution creditors of herself from levying their executions upon such house and lot, and subjecting the same to the payment of their debts. The garnishee assented to the proposition; and a note for five hundred dollars was executed

to him by the defendant ; and a mortgage, with a power of sale, to secure the payment of the note, was given. The garnishee answers, that he expected, when he took the mortgage, to sell groceries to the defendant, and that the payment for them would be secured by the mortgage. The mortgage, however, is not given to secure any prospective debt, and is given alone for the security of the payment of a subsisting note of five hundred dollars. Neither the note for three hundred dollars, held by the garnishee on the defendant, nor the note on which he was surety for her, was secured by the mortgage ; and they were paid, as above stated, from the income of the blacksmith-shop. The only debt for the security of which the mortgage was given, was the debt of two or three hundred dollars, for groceries. It follows, that the note for five hundred dollars was in part a simulated debt. The mortgage was made by the mortgagor to prevent the collection of her debts out of her property. This fraudulent purpose was communicated to the garnishee, who agreed to take it, knowing the purpose of its execution ; and besides, the garnishee became a party to an arrangement, by which a note, simulated as to a part of its amount, was drawn and secured by the mortgage. We cannot hesitate to decide, without looking farther, that the mortgage was made to hinder, delay, and defraud creditors. There was, therefore, within the meaning of section 2523 of the Code, " actual fraud," as defined in the case of *Price v. Masterson*, 35 Ala. 483. We must further decide, that the garnishee was guilty of the actual fraud ; for it is correctly held, in the same case, that the mortgagee who takes a mortgage, knowing of the mortgagor's fraudulent intent, is a participant in the fraud.

[2.] It is held in *Price v. Masterson*, *supra*, that the provisions of section 2523 of the Code, although mentioning only trustees, apply to mortgagees with a power of sale. It is further held, in the same case, that such a mortgagee, the mortgage being in fact fraudulent, if himself guilty of actual fraud, cannot retain, from the proceeds of the sale of the mortgaged property, a debt due to himself, as against the mortgagor's creditor, who has sued out process of garnishment against him.

It results from what we have said, that the court below erred in discharging the garnishee, and ought to have rendered a judgment against him for the entire amount at which he sold the mortgaged property.

Reversed and remanded.

JUDGE, J., not sitting, having been of counsel.

LOTT vs. MORGAN.

[ACTION TO RECOVER TAXES PAID UNDER PROTEST.]

1. *State taxation of steamboats and vessels.*—The provision of the Federal constitution, (art. I, § 10,) which prohibits a State to “lay any duty of tonnage,” applies to and includes vessels which are licensed in the coasting trade, and which are exclusively engaged in the towage and lighterage business in the bay and harbor of Mobile, carrying passengers and freight between the city and vessels at anchorage in the bay; and as to such vessels, the tax imposed by the twelfth paragraph of the second section of the revenue law approved February 22, 1866, (Session Acts, 1865-6, p. 7,) “on all steamboats, vessels, and other water-craft plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage thereof,” is unconstitutional and void.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Thomas P. Morgan, against Elisha B. Lott, and was commenced on the 5th July, 1866. The complaint contained only the common count for money had and received; the amount claimed being twelve hundred and eighteen 36-100 dollars, with interest from the 27th March, 1866. The defendant was the tax-collector of Mobile county, and assessed a tax, on the 13th March, 1866, against two steamboats, called respectively *Hattie* and *Lizzie*, which belonged to the plaintiff. The tax was assessed under the provisions of the second section of the rev-

venue law approved February, 22, 1866. The plaintiff denied the validity of the tax, and refused to pay it; and the defendant having thereupon seized the boats, and taken them into his possession, under the provisions of said revenue law, the plaintiff paid the tax under protest, and brought this action to recover the amount. The case was submitted to the decision of the court below, on an agreed statement of facts, in which the boats were thus described: "The plaintiff is a citizen of the United States, and resident out of the State of Alabama; and he was on the 27th March, 1866, and during the time they were within the limits of the State of Alabama, the owner of the steamboats *Hattie* and *Lizzie*; which said steamboats are respectively of the measurement of three hundred and fifty-six 35-100 tons, and two hundred and five 85-100 tons. Said steamboats were each enrolled in the port of New Orleans, Louisiana, in pursuance of the acts of the congress of the United States, approved February 18, 1793, entitled 'An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same,' and approved May 16, 1864, entitled 'An act to regulate the admeasurement of tonnage of ships and vessels of the United States.' Copies of said enrollments are made part of this agreed statement of facts. Prior to the 27th March, 1866, and between that date and the 1st day of January, 1866, said steamboats were each engaged in the bay and river of Mobile, plying between the city of Mobile and the forts at the mouth of the bay, and the vessels anchored at the lower anchorage in said bay, and altogether within the bay of Mobile, and upon tide-waters navigable from the sea, by vessels of ten and more tons burthen; and were occupied in the towage and lighterage business of the port of Mobile." It was further agreed, "that if the court shall be of opinion, on the facts herein stated, that the said tax is illegal, and ought not to be enforced or collected, then judgment shall be rendered for the plaintiff, for the amount paid by him to the defendant, with interest and costs; and if the court shall be of opinion, on the contrary, that said tax is legal, and authorized by the laws of the land, then judgment for costs shall be entered against

the plaintiff; and either party may appeal to the supreme court."

On the agreed facts, the circuit court rendered judgment for the plaintiff; and its judgment is now assigned as error.

THOS. H. HERNDON, for appellant.—1. It is admitted, that the State tax is a tax on tonnage, *eo nomine*, and comes within the letter of the prohibition of the Federal constitution; but it is submitted that it does not come within the spirit and meaning of that constitutional provision. The constitution refers to the tonnage of vessels employed in foreign commerce, or commerce between the States, and not to vessels engaged exclusively in the internal trade and navigation of the State.—1 Story on the Constitution, § 1016; *Perry v. Torrence*, 8 Ohio, 524. This duty of tonnage is a part of the taxing power; and if the constitutional prohibition does not apply to vessels engaged in the purely internal commerce and navigation, then the State, by virtue of its general power to levy taxes, may assess the tax in any mode, and to any extent, it may deem prudent and wise.—*De Witt v. Hays*, 2 Cal, 467; *Nathan v. Louisiana*, 8 Howard, 82; 9 Wheaton, 202.

2. The fact that the vessels had been enrolled under the acts of congress, and licensed to carry on the coasting trade, does not exempt them from State taxation. The effect of the license is to authorize the owner of the vessel to carry on the coasting trade, and to navigate the waters of the United States.—3 Gill, 14; 9 Wheaton, 1-212; 17 Howard, 596. But there is no incompatibility between the license and the State tax: the tax does not interfere with the right to navigate.—Same authorities. Besides, the agreed facts in this case show, that the vessels were plying completely within the territorial and jurisdictional limits of the State, and had thus abandoned the coasting trade, and become incorporated with the property of the State.

3. The provision in the ordinance of 1819, declaring "that all navigable waters within this State shall forever remain public highways, free to the citizens of this State and of the United States, without any tax, duty, impost, or

toll therefor, imposed by the State," has nothing to do with the case. That provision of the ordinance was simply intended to prevent any discrimination against the citizens of other States, and not to limit or interfere with the State's general power of taxation. It is very similar to the ordinance of 1787, (1 U. S. Statutes at large, 51-2, note,) which has been thus construed.—*Perry v. Torrence*, 8 Ohio, 521-6.

P. HAMILTON, *contra*.—The prohibition of the Federal constitution is plain and explicit: "No State shall, without the consent of congress, lay any duty of tonnage." The word *duty*, as defined by Bouvier and Webster, means *tax*; and *tonnage* means the capacity of a vessel, measured by tons. The constitution says, then, that a tax on vessels, regulated by their capacity, shall not be laid by the State; while the Alabama statute levies a tax on them, and measures the tax by their tonnage. The conflict is palpable; and, as if to make it more apparent, the tax is levied only on vessels plying in the navigable waters of the State, and is to be measured by their registered tonnage. The whole subject is under the jurisdiction of the United States, and is regulated by the acts of congress.—*Gibbons v. Ogden*, 9 Wheaton, 186; *Sinnot v. Davenport*, 22 Howard, 244.

2. The tax can not be sustained, as falling within the power of the State to levy tolls for the use of improvements on navigable waters. It is not confined to waters on which improvements have been made, and is not limited to vessels which could not use the waters in their natural condition. 12 Conn. 7; 18 Conn. 500.

3. The tax is in direct violation of the ordinance of 1819, which specifies the conditions on which Alabama became one of the United States, and which declares that its navigable waters shall forever remain free, "without any tax, duty, impost, or toll therefor," levied by State authority.

BYRD, J.—If we have correctly comprehended the argument of the counsel for the appellant, it may be thus condensed: Admitting that the tax is a duty on tonnage, and that it comes within the letter of the prohibition of the

10th section of the first article of the Federal constitution ; still it does not come within the meaning and intent of that section, because the tonnage referred to therein is the tonnage of vessels employed in foreign commerce, or commerce between the States, and not of vessels engaged in the internal trade and navigation of the State ; and therefore it is competent for the State legislature to tax such vessels, and to do so by a tax on tonnage, as the most equitable mode or measure of taxation.

However forcible this argument may be, as applicable to a vessel engaged exclusively in the internal commerce and trade of the State ; yet we are satisfied that it is not sound, when applied to vessels licensed in the coasting trade, and which are exclusively engaged in transporting cargoes from vessels engaged in foreign commerce, which are bound to the port of Mobile, and are under the necessity of forwarding their cargoes by such vessels as these from their anchorage in the bay of Mobile, and receiving their return cargoes from them, and in towing vessels engaged in foreign commerce, to the city of Mobile.

While the States are prohibited from laying " any duty of tonnage," it seems to be settled, by the weight of authority, that the States may tax the capital invested by its citizens in steamboats. Why a tax may not be assessed upon tonnage, and yet may be upon the capital invested in a vessel, or, perhaps, upon the value of the vessel, or stock held in it, we are not called upon, in this case, to explain or adjudicate. We only say, that the first is prohibited by the constitution of the United States ; and we do not feel authorized to depart from the letter, when it is so plainly written, to seek out some other meaning or intent, which, if found, would be in the teeth of the letter.

What we have said is to be taken as applicable *only* to the facts of the case before us. We have come to the conclusion, upon the facts, and the law applicable to them, that the court below committed no error in the judgment rendered ; and this conclusion is sustainable upon the principles announced in the following adjudications : *Sheffield v. Parsons*, 3 Stew. & Por. 302 ; *Gibbons v. Ogden*, 9 Wheaton, 186 ; *Hays v. The Mail Steamship Co.*, 17 How. 596 ; *Sinnot*

et al. v. Davenport et al., 22 How. 227, 244-46; *Corley v. Philadelphia*, 12 Howard; *Harbor Master of Charleston v. W. & R. R. Co.*, 3 Strob. 594; *The State, ex rel. v. City of Charleston*, 4 Rich. 286.

We do not think that the cases of *Battle v. Corporation of Mobile*, (9 Ala. 234,) and *Commissioners of Pilotage v. Steamboats Cuba and Swan*, (28 Ala. 185,) are in conflict with the case of *Sheffield v. Parsons*, (*supra*,) upon this question, when the facts of the latter case are considered with reference to the doctrine therein laid down and applied.

There is no error in the record, and the judgment of the court below must be affirmed.

HART ET AL. vs. McCLELLAN.

[BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF CONTRACT.]

1. *Partial performance of parol contract for sale of lands.*—A parol contract for the sale of lands is not taken out of the operation of the statute of frauds, on the ground of partial performance, where the facts relied on, as constituting a part payment of the purchase-money, simply show that the purchaser furnished to the company present, "as a treat," five drinks of liquor, which were worth at the time five dollars in Confederate currency, and the contract itself did not require any cash payment.
2. *Averment of performance, or readiness and willingness to perform.*—A purchaser, asking the specific performance of a parol contract for the sale of lands, must aver in his bill the facts showing a full compliance on his part with all the stipulations of the contract: a general allegation, "that he has offered, and has always been ready and willing to comply with his contract," not stating the facts, is not sufficient.

APPEAL from the Chancery Court of Henry.

Heard before the Hon. N. W. COCKE.

THE bill in this case was filed, on the 13th February, 1866, by Daniel McClellan, against Manson D. Hart and Joel A. Hudspeth, for the purpose of compelling the specific performance of a parol contract for the sale of lands. The material facts of the case are stated in the opinion of

the court. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant ; and his decree is now assigned as error.

MARTIN & SAYRE, for appellants.

W. C. OATES, *contra*.

JUDGE, J.—The bill in this case is for the enforcement of specific performance of a parol contract for the sale of lands. It is contended by the appellee, that his case is without the influence of the statute of frauds, on the ground of an alleged payment by him of a portion of the purchase-money, and that he was put in possession of the land by the seller.—Code, § 1551.

The agreement sought to be enforced, it is alleged, was entered into in February, 1866, and was, in substance, that the appellee should pay one thousand dollars for the premises, in two installments, (five hundred dollars on the first of January, 1867, and five hundred dollars on the first of January next thereafter,) and should secure the payment of the purchase-money, by executing to the appellant Hart his promissory notes for the same, with or without security, as the said Hart might elect. The purchaser was to take immediate possession. The part payment of the purchase-money, relied on by the appellee, consisted of five drinks of liquor of some kind, called in the bill “merchandise,” of the value of one dollar and twenty-five cents, and averred to have been furnished the appellant Hart, at the time of the agreement. Upon a survey of the testimony, we find it difficult to resist the conclusion, that these five drinks were furnished to the persons present, including Hart, not as a part payment of the purchase-money, pursuant to the contract, but as a “*treat*” on the agreement which had been entered into ; and this conclusion is strengthened by the fact, that the terms of the contract required no part of the purchase-money to be paid until the first of January, 1867 ; a period long after the time of the alleged part payment.

2. But the bill in this case cannot be maintained for another reason. The appellee does not aver performance on his part of the conditions required by the contract to

be performed by him. He does not show by his bill that he executed and tendered, or offered to execute, the notes for the purchase-money. The general allegation of the bill, that he has "offered, and has always been ready and willing to comply with his contract," is not sufficient in a bill for specific performance. The *facts* constituting the offer should have been given, so that the court might judge of the correctness of the conclusion stated, and determine whether the appellee had taken all proper steps towards performance on his own part, and had been ready, desirous, and prompt to perform.—*Bell v. Thompson*, 34 Ala. 633; *Billingslea v. Billingslea*, 37 Ala. 425; *Cox v. Boyd*, 38 Ala. 42; *Gentry v. Rogers*, at January term, 1867.

The decree of the chancellor must be reversed, and the bill dismissed. The appellee must pay the costs of this court, and of the court below.

ROSE ET AL. vs. PEARSON.

[MOTION TO QUASH EXECUTION ON FORFEITED BOND, AND SET ASIDE RETURN OF FORFEITURE.]

1. *Forthcoming bonds in detinue cases, and under 3d section of "stay law" of February 8, 1861.*—Where the complaint in an action of detinue, instituted in April, 1861, is in the form prescribed by the Code, (p. 552,) "for the recovery of chattels in specie"; while the forthcoming bond taken from the defendant, instead of being conditioned as required by section 2192 of the Code, is drawn in pursuance of the provisions of the third section of the act approved February 8, 1861, commonly called the "stay law," (Session Acts, 1861, p. 4,) there is no statute which gives to the bond, when returned forfeited, the force and effect of a judgment, or authorizes the issue of an execution on it,

APPEAL from the Circuit Court of Henry.

Tried before the Hon. H. D. CLAYTON.

THE facts of the case are stated in the opinion of the court.

ALPHEUS BAKER, and STONE, CLOPTON & CLANTON, for the appellant.

JAS. L. PUGH, and F. M. WOOD, *contra*.

A. J. WALKER, C. J.—In April, 1861, the appellee, Pearson, instituted an action of detinue against the appellant, Rose. The complaint is in the form prescribed by the Code, in actions “for the recovery of chattels in specie.” Code, p. 552. The plaintiff made affidavit, that the property for which suit was brought belonged to him, and also gave bond, with surety, conditioned as prescribed in section 2192 of the Code. The clerk made an order, directing the sheriff to take the property into his possession, unless the defendant should give bond, with good and sufficient sureties for the forthcoming of the property to answer the lien created by a specified mortgage, on which a described note alone was unpaid, or, in default thereof, to pay such debt and interest, with all cost. Judgment, on verdict, was rendered for the plaintiff, in October, 1866. On the 18th February, 1867, the clerk issued a *feri facias*, in which, after reciting that the bond above described had been returned by the sheriff “forfeited,” he commands that officer to make out of the defendant, and the sureties on his bond, the amount of the judgment and costs. Another execution, of similar character, was issued to another county. A motion was made, in the names of the defendant and his sureties on his bond, to set aside the forfeiture of the bond, and to quash the execution.

The bond to be given by the defendant in detinue, in order that he may retain possession of the property, as prescribed in the Code, is conditioned, that if cast in the suit, he will, within thirty days thereafter, deliver the property to the plaintiff, and pay all costs and damages, which may accrue from the detention thereof.—Code, § 2192. The condition of the bond here is altogether different. It is, that the defendant will have the property forthcoming to answer the lien of a certain mortgage. Therefore, section 2195 of the Code, which gives to the former bond the effect of a judgment, and authorizes the issue of execution upon

its forfeiture, can have no reference to the bond in this case, or direct the mode of its enforcement.

The bond is drawn conformably to the third section of the act of 8th February, 1861.—Session Acts, p. 4. That section prohibits the sale of property, under a mortgage or deed of trust, without actual possession thereof. It then proceeds to provide a mode of recovering possession by the trustee, or mortgagee having a power of sale, when the grantor, on demand, fails to deliver possession, after making default; and that if the property be personal, and the plaintiff make affidavit of title, the sheriff should take possession, unless the grantor should give bond, “as in detinue cases,” conditioned as above stated. There is nothing in the complaint to identify this with the action authorized by the 3d section of the act of 1861. The circumstances, under which the action is permitted by the statute, are not averred in the complaint. This, therefore, not appearing from the complaint to be an action in which the bond is directed to be taken, it is contended that there was an entire want of authority to take it; and that therefore no execution could issue upon it.

We do not find it necessary to affirm or disaffirm the correctness of this argument. But there is another, and a conclusive reason, why the bond here can not have the effect of a judgment, upon which execution may issue. Such effect can never be conceded to a bond, without the authority of a statute.—*Campbell v. May*, 31 Ala. 567. There is no statute, which gives to this bond the effect of a judgment. We are pointed to the direction of the statute, that the “grantor shall give bond, with good and sufficient sureties, as in detinue cases,” as showing that the bond shall have the effect of a judgment in the same manner with the defendant’s bond in the ordinary detinue suit. It is probable that the words, “as in detinue cases,” were designed to require that the bond should be, as in detinue cases, in double the amount of the value of the property. But, however this may be, the language pertains to the manner in which the bond is to be given, and admits of no construction which would refer it to the effect of the bond.

The third section of the act of 8th February, 1861, to-

gether with other sections and another act, were repealed by the 16th section of the act of 10th December, 1861. Pamphlet Acts, p. 38. To the repealing clause there is added a proviso, that bonds taken in pursuance of the repealed acts should remain valid, and might be returned forfeited as provided in the repealed acts; and that executions might be issued thereon, as provided by the repealing law. It is obvious that the purpose of the proviso to the repealing act was, not to impart a new effect to the bonds taken under the repealed law, but to leave their validity and effect unaffected by the repeal. There is no provision, either in the original act, or in the act containing the repealing clause, which gives to this bond the effect of a judgment, or authorizes the issue of execution upon it.

There was no authority to declare the bond forfeited and issue execution upon it.

The remedy resorted to in this case is held to be the proper one, in *Shorter v. Mims*, 18 Ala. 655.

The judgment of the court below is reversed, and a judgment is here rendered, quashing the execution in favor of B. F. Pearson, against C. A. Rose, E. W. Cotter, B. C. Flake, H. W. B. Price, and R. A. Solomon.

HARRISON vs. NOLIN.

[PETITION FOR RE-HEARING AFTER FINAL JUDGMENT AT LAW.]

1. *When order granting re-hearing is revisable.*—When the record does not set out the evidence, on which the court below granted a re-hearing after final judgment, (Code, § 2408,) the appellate court can not revise its action.
2. *Specification of causes of demurrer.*—Where a demurrer to a petition for re-hearing after final judgment at law is overruled by the primary court, and the record does not show what causes of demurrer, if any, were assigned, (Code, § 2253,) the appellate court will not consider the sufficiency of the petition, but will presume that no causes of demurrer were in fact assigned, or that none were well assigned.

APPEAL from the Circuit Court of Barbour.

The record does not show the name of the presiding judge in the court below.

THE appellant in this case instituted a real action, in the nature of an action of ejectment, against the appellee, on the 20th March, 1859, and recovered a judgment by default on the 7th December, 1860. On the 19th March, 1861, the defendant filed a petition, under oath, asking a re-hearing of the cause; and on the 9th November, 1866, the following judgment was rendered: "Came the defendant, by attorney, and made application for a new trial in this case, and the plaintiff demurred to the application; which demurrer was overruled by the court, and the plaintiff excepted; and upon hearing all the facts of the case, it is ordered by the court, that a new trial be granted, and that the cause be continued, to be tried at the next term of the court." There is no bill of exceptions in the record, nor does the record show what causes of demurrer, if any, were assigned. The overruling of the demurrer to the petition, and the order granting a new trial, are now assigned as error.

W. C. OATES, for the appellant.

JAS. L. PUGH, *contra*.

BYRD, J.—The court granted a new trial, "upon hearing all the facts in the case." The record does not set out the facts upon which the court granted a re-hearing, and we can not therefore say that the court erred in the order made.

2. There was a demurrer to the application, but the record does not show the grounds of demurrer assigned; and in this state of the record, we must presume, in favor of the ruling of the court, that no ground was assigned that was good, or well assigned.—*Helvenstein v. Higgason*, 35 Ala. 259; *Robbins v. Mendenhall*, 35 Ala. 722.

Judgment affirmed.

SWINK'S ADM'R vs. DECHARD.

[ACTION FOR BREACH OF VENDOR'S TITLE-BOND.]

1. *Tennessee statute of 1794, as to enforcement of deceased vendor's title-bond.* The provision in the Tennessee statute of 1794, which declares that an executor or administrator "shall not be bound to make title" to lands sold by the decedent in his life-time, "until the bond or obligation of the decedent shall have been recorded in the county in which the land lies," &c., relates merely to the remedy for the enforcement of the contract, and, therefore, constitutes no defense to an action here for a breach of such title-bond; but the subsequent provision of that statute—"nor shall the holders of such obligations charge the personal estate of such decedent, until they shall have produced the obligation, duly authenticated," &c.—affects the validity of the contract sought to be enforced, and a failure to comply with it is a complete bar to such action.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. JOHN E. MOORE.

THIS action was brought by Peter S. Dechard, against John S. Eustace, as the administrator of Philip D. Swink, deceased; and was commenced on the 31st July, 1854. The complaint was as follows: "The plaintiff claims of the defendant two thousand dollars, for the breach of the conditions of a bond, made by the defendant's intestate, Philip D. Swink, in his life-time, on the 2d day of March, 1841, payable to the plaintiff, in the sum of two thousand dollars, with condition that, in consideration of one thousand dollars to him (said intestate) in hand paid, he (the said intestate) bargained and sold the said plaintiff the following described land, situate, lying, and being in Franklin county, State of Tennessee, on Elk river, and adjoining the school land, the lands formerly owned by John Sturdevant and others, being the same land that said intestate's father purchased of Col. James Lewis, and containing by estimation two hundred and fifty-three acres, more or less; and said intestate then and there, by said bond, bound himself to make said plaintiff a good warranty title to said tract of

land, and every part thereof, by the first day of January, 1843, and sooner if practicable, and, in the mean time, to transfer to the plaintiff the title-bonds held by said intestate, made by his brothers Edwin and William Swink, for their interests in said land; for the true performance of all which, the said intestate bound himself in the penal sum of two thousand dollars. And the plaintiff saith, the conditions of said bond have been broken by the defendant, in this, that said intestate did not, by or before the first day of January, 1843, make to the said plaintiff a good warranty title to said tract of land, and every part thereof, nor did said intestate at any time transfer to plaintiff said title-bonds made by said intestate's brothers Edwin and William Swink, for their interest in said land, but to do so said intestate wholly neglected; to plaintiff's damage as before stated."

The defendant filed ten pleas, the third of which was in these words: "And for further answer to said complaint, he defendant saith, that by an act of the legislature of the State of Tennessee, passed in 1794, and which is now, and was at the date of said bond mentioned in said complaint, in full force and unrepealed, and which is in the following words and figures: 'It shall be lawful for executors or administrators of any person or persons deceased, to make titles to any tract or parcel of lands in this State, which the person or persons were bound to make by his, her, or their obligation, in as full and as ample a manner as the decedent or decedents could have done in his, her, or their life-time; but the executor or administrator, as the case may be, shall not be bound to make such title, or titles, or deed, until the bond or obligation of the decedent shall have been recorded in the county where the land lies, and a copy of the same produced to him or her, duly authenticated; nor shall the holders of such obligations charge the personal estate of such decedent or decedents, until they shall have produced the obligation, duly authenticated, and demand made, and a refusal or failure to comply therewith on the part of such representative or representatives.' And said defendant avers, that the bond mentioned in said complaint was made, executed, and delivered in the county of

Franklin, and State of Tennessee aforesaid, for the tract or parcel of land, situate, lying, and being in the said county of Franklin, as mentioned in the conditions of said bond ; and that said plaintiff never had said bond recorded in said county, and a copy thereof, duly authenticated, presented to him as such administrator, or to any administrator of his intestate ; nor has the plaintiff ever produced said bond, duly authenticated, as required by the laws of Tennessee, to him as such administrator aforesaid, whereby to charge the personal estate in his hands to be administered ; and this he is ready to verify."

The court sustained a demurrer to this plea, and its ruling thereon is now assigned as error. The causes of demurrer assigned, if any, are nowhere stated in the record.

JAMES ROBINSON, for appellant.

WALKER & BRICKELL, *contra*.

JUDGE, J.—The construction, interpretation, and validity of a contract, are governed by the law of the place where it was made. If the foreign law does not affect the contract itself, but relates only to the remedy for its enforcement, it can not be regarded, the remedy for a breach of the contract being governed by the law of the forum in which it is sought to be enforced.—Shepherd's Digest, 476, §§ 13, 14 ; 2 Kent, 455-63.

In the case before us, the defendant below, in his third plea in bar of the plaintiff's action, avers, that the bond sued on was executed in the county of Franklin, and State of Tennessee ; and that the tract or parcel of land, which is the subject-matter of the bond, is situate in the said county and State ; and there is set out in the plea a statute of the State of Tennessee, which, it is averred, was, at the date of the bond, and at the time the plea was filed, "in full force and unrepealed." The statute, as set forth, is as follows : "It shall be lawful for the executors or administrators of any person or persons deceased, to make titles to any tract or parcel of land in this State, which the person or persons were bound to make by his or her obligation, in as full and as ample a manner, as the decedent or

decedents could have done, in his, her, or their life-time ; but the executor or administrator, as the case may be, shall not be bound to make such title or titles, or deed, until the bond or obligation of the decedent shall have been recorded in the county where the land lies, and a copy of the same produced to him or her, duly authenticated ; nor shall holders of such obligations charge the personal estate of such decedent or decedents, until they shall have produced the obligation, duly authenticated, and demand made, and a refusal or failure to comply therewith on the part of such representative or representatives." It is further averred in the plea, that the plaintiff below never had said bond recorded in the county of Franklin, and State of Tennessee, and a copy thereof, duly authenticated, presented to the defendant as administrator, or to any other administrator of his intestate ; and that the plaintiff never produced said bond to him as administrator, duly authenticated, as required by the statute of Tennessee, whereby to charge the personal estate of decedent, in the hands of defendant as his administrator to be administered.

The provisions of the statute pleaded, relating to conveyances of lands, in cases where the obligor of a bond for titles dies before the execution of the conveyance, we regard as giving a remedy only ; and therefore they can not be made the subject of extra-territorial application. But the subsequent provision, exempting the *personal* estate of such a decedent from being charged in favor of the holder of such an obligation, unless the pre-requisites of the statute are complied with, relate to the validity of the contract itself, when it is sought to be enforced by a recovery of damages for an alleged breach of it, in an action at law. A recovery, in such an action, would be a charge upon the personal estate of the decedent, and is expressly within the inhibition of the statute, if the conditions precedent prescribed by it have not been performed. We therefore hold, that the matters of the third plea were properly pleadable in bar of the present action, and that in sustaining the demurrer to the plea, the court below erred.

As our conclusion upon this question will probably be

decisive of the case, we do not consider any of the other questions presented by the record.

Judgment reversed, and cause remanded.

JONES' ADM'R vs. SHADDOCK.

[BILL IN EQUITY TO ENFORCE PAROL TRUST IN SLAVES.]

1. *Parol voluntary trust in slaves enforced against purchaser with notice.*—Where slaves are conveyed by a father to his reputed daughter, in consideration of natural love and affection, by deed of gift absolute on its face, but under a parol trust that the grantee shall, within a specified time, convey them to her children, the trust may be enforced in equity, at the instance of the children, after the death of the grantor, against one who purchased from the grantee with notice of the trust.
2. *Liability of such implied trustee.*—The purchaser in such case, if he allows the slaves to hire their own time, and acquire money or property for themselves, is not bound to assert title to such acquisitions; yet, if he does assert title thereto, he holds such acquisitions for the benefit of the *cestuis que trust*, and is chargeable with the same at their instance.
3. *Same.*—If he sells a negro to one of the slaves held by him under such trust, and receives in payment money arising from the slave's earnings, the title to the negro so sold does not thereby pass from him, but he holds the money subject to the trust.

APPEAL from the Chancery Court of Bibb.

Heard before the Hon. JOSEPH R. JOHN.

THE bill in this case was filed, on the 19th November, 1859, by the five youngest children of Martha Shaddock, (now Martha Carey, the wife of William Carey,) against the said Martha and William Carey, and one Hugh Jones; and sought to enforce a parol trust in three slaves; to-wit, Dick, Turner, and Wash, and to charge the defendant Jones with the value and hire of said slaves. The slave Dick, with other slaves, was conveyed to the said Martha Shaddock, by deed of gift dated the 30th March, 1852, in consideration of natural love and affection, by John Herndon,

who was the reputed father of said Martha, and who died before the bill in this case was filed. The bill alleged, that this conveyance was made in trust for the use and benefit of the complainants, and on the express promise of the said Martha to convey said slaves to them within one month from that time. On the 13th April, 1852, said slave was sold and conveyed by Martha Shaddock, to said Hugh Jones; and the bill alleged, that Jones, at the time of his purchase, had notice of the trust under which said Martha held the slave. The slave was allowed by Jones to go at large, and act as a freeman; and the bill alleged, that, by his earnings and acquisitions, he bought and paid for two other slaves, Turner and Wash, and had the bills of sale for them taken in the name of said Jones. In October, 1857, Jones sold and conveyed the three slaves to one F. M. Thomason, by whom they were carried out of the county. The bill prayed, that an account might be taken of the value of the slaves at the time they were sold by Jones, and of their hire and earnings while in his possession, and for a money decree against him for the amount so ascertained; and the general prayer was added.

The defendant Jones, in his answer, denied all knowledge of the alleged trust at the time he purchased the slave Dick; but asserted that he was told by said Martha Shaddock, before and at the time of his purchase, that she held the slave under an absolute deed of gift from John Herndon, but had promised Herndon that, so soon as the slave paid her eight hundred dollars, she would emancipate him; and that he bought the slave from her at the slave's own request, and with the intention to emancipate him so soon as he had paid for himself. He admitted, that Dick had bought and paid for the boy Turner, and had also paid him five hundred dollars for Wash, who belonged to him; and that he held the legal title to both Turner and Wash, until he conveyed them to said Thomason. He averred, that he had intended in good faith to emancipate Dick, had allowed him to go at large and act as a freeman, and had filed a petition in the probate court for the purpose of emancipating him; that Martha Shaddock having afterward instituted an action at law against him for said slave, he

transferred all his interest in the slaves to Thomason, in order to rid himself of all further trouble about them, taking from Thomason an obligation to indemnify him against all costs and damages in said suit; and that he had no knowledge or notice whatever of the complainants' alleged interest in the slaves, until after the bill was filed. He also demurred to the bill, for want of equity, and on account of the staleness of the demand; and pleaded the statute of frauds, and the statute of limitations.

The bill prayed process of subpoena against Carey and wife; but the record does not show that any process was ever issued against them, or that they ever appeared, or that any decree was rendered against them.

The complainants took the depositions of F. M. Eiland, who wrote the deed of gift from Herndon to Martha Shaddock, and of J. W. Foshee, who was the attesting witness. Both of these witnesses proved the parol trust under which Martha Shaddock received the slaves, as alleged in the bill; and Eiland further testified, that he communicated all the facts, a few days afterwards, to the defendant Jones.

The demurrer to the bill was argued before Chancellor CLARK, and by him overruled. On final hearing, on pleadings and proof, Chancellor JOHN rendered a decree for the complainants, and directed the master to state an account, charging the defendant Jones with the value of the slaves Dick and Turner, and with their earnings while they were in his possession. The defendant Jones died before the account was stated by the master, and the suit was revived against his administrator. The appeal is sued out by the administrator, and the final decree is assigned as error.

JOHN T. MORGAN, for the appellant.—So far as the complainants are concerned, the parol trust under which Martha Shaddock received the slaves, if it be sufficiently proved, is voluntary, and executory; and a court of equity will not enforce it at their instance.—*Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Crompton v. Vasser*, 19 Ala. 264; Lewin on Trusts, 177; 2 Roper on Legacies, 1787.

J. R. JOHN, *contra*.—1. The trust was fully created and

executed, and will be enforced in equity, not only against the trustee, but against a purchaser with notice.—*Bishop's Heirs v. Bishop's Adm'rs*, 13 Ala. 483; *Story's Equity*, §§ 973, 977; *Crompton v. Vasser*, 19 Ala. 264.

2. If the slave Dick was subject to the trust, in the hands of the defendant Jones, his earnings and acquisitions are also subject to it.—*Brandon v. Huntsville Bank*, 1 Stewart, 337; *Shanklin v. Johnson*, 9 Ala. 274; *Jenkins v. Brown*, 6 Humph. 301; *Graham v. Strader*, 5 B. Monroe, 186.

A. J. WALKER, C. J.—There can be no doubt, that the conveyance by John Herndon to Martha Shaddock was upon a valid trust, and that Hugh Jones took the title to the slave Dick with full knowledge of that trust. This trust was properly enforced against Jones.—*Bishop v. Bishop*, 13 Ala. 475. Jones, having converted Dick to his use, in violation of the trust, was chargeable as a trustee in reference to such slave; and his administrator was also chargeable with the hire of the slave, from the date of the conveyance to said Jones.

[2.] We have had more difficulty with the question as to the other two slaves, Wash and Turner. Dick, being permitted to go at large, and act as a freeman, acquired money with which to purchase these slaves, Wash and Turner. He purchased and paid for Turner, and took a title in the name of the defendant's intestate, who held the title also to Dick. He purchased Wash, at the price of five hundred dollars, from the defendant's intestate, and paid for him; but a bill of sale was not made. The acquisitions of slaves, even though made with the owner's consent, belong to their owners, who may assert their rights thereto; but the owners can not assert their claims to such acquisitions after they have been disposed of by the slaves, and passed from such slaves.—*Shanklin v. Johnson*, 9 Ala. 271; *Devaughn v. Heath*, 37 Ala. 595; *Webb v. Kelly*, 37 Ala. 333; *Martin v. Reed*, 37 Ala. 198; *Stanley v. Nelson*, 28 Ala. 514; *Carmille v. Carmille*, 2 McMullan, 454; *Broadhead v. Jones*, 39 Ala. 96. The owner may, or may not, at his option, assert his title to his slave's acquisitions. We are not prepared to

hold, that a trustee is bound to exact for his *cestui que trust* the acquisitions of a slave, which slave is the subject of the trust. We do not think that Jones, the defendant's intestate, was bound to appropriate the acquisitions of the slave Dick to the benefit of the trust, or was liable for neglecting to do so. We would not decide that the mere neglect to assert a title to Turner would, of itself, be a ground of liability in the trustee. We think the trustee could exempt himself from accountability for Dick's acquisitions, by forbearing to assert any ownership over them.

Jones, the defendant's intestate, did not, until he sold the slaves, assert any title to the earnings of Dick, or title to Turner, who was bought by Dick, or to Turner's earnings. We decide, that the court erred in charging the defendant on account of the earnings of any of the slaves, not claimed by him.

While we decide that the involuntary trustee was not bound to claim for the trust the earnings of the slaves, yet he could claim them, and, if he did so, his claim must be held to be for the benefit of the trust. A trustee could not take any property, by virtue of a title which the law deems to be in him as trustee, except for the benefit of the trust. In 1857, Jones, the trustee, asserted his title to Dick and Turner, the latter being a slave bought by Dick. He not only asserted his title to them, but transferred them to one Thomason, for a consideration specified in the pleadings. His duty as trustee was to hold the slaves, after he asserted his title, for the benefit of the trust. In not doing so, and in transferring the slaves to be carried out of the county, he was guilty of a wrongful conversion, as against the *cestuis que trust*, and is chargeable with the value of these slaves at that time.

[3.] The slave Wash belonged to Jones. Dick paid Jones five hundred dollars for this slave. We concur with the chancellor in the opinion, that the title to Wash did not pass out of Jones by this transaction. The point seems to be so decided in the case of *Webb v. Kelly*, 37 Ala. 333. But the five hundred dollars, the fruit of Dick's earnings, received by Jones, must be clothed with the same trust as was the slave Dick. The trustee could not receive the

earnings of the slave, freed from the trust. We think the chancellor correctly held the defendant liable for the five hundred dollars received by Jones from Dick, and refused to make him liable for the value of Wash.

The chancellor ought to have rendered a decree to the effect following: that an account should be taken, charging the defendant—1st, with the reasonable annual hire of the slave Dick, from the date of the purchase by the defendant's intestate, to the sale by him, and also with interest on such annual hire; 2d, with the value of the slaves Dick and Turner, at the time of the sale of them by defendant's intestate, and interest on such value; 3d, with the sum of five hundred dollars, and interest thereon, from the time of its payment by Dick to defendant's intestate. We deem it prudent not to render a decree ourselves, because the defendant Jones died after the decree in the court below, and it may be that the condition of his estate may require some special order.

Reversed and remanded.

BYRD, J., not sitting.

WRIGHT'S ADM'RS vs. WILKERSON.

[FINAL SETTLEMENT OF SPECIAL ADMINISTRATOR'S ACCOUNTS.]

1. *Compensation of administrators.*—Section 1825 of the Code, which relates to the compensation of executors and administrators, applies to and includes special administrators; and the word *receipts*, as used in said section, means pecuniary assets only, and does not embrace the other property which may come to the hands of the personal representative.
2. *Same.*—An executor or administrator cannot, on final settlement of his accounts, claim the allowance of a gross sum for his services, but must specify the items for which he claims compensation, as in chancery cases, and adduce proof of the value of his services in connection with each item.

3. *Allowance for attorney's fees.*—The probate court has no authority, on final settlement of an administrator's accounts, to render a decree in favor of his attorney and solicitor, for the value of his professional services rendered to the administrator.

APPEAL from the Probate Court of Russell.

IN the matter of the estate of James Wright, deceased, on final settlement of the accounts and vouchers of Jesse Wilkerson, as special administrator of said decedent. Letters of special administration on the estate of said decedent were granted to said Wilkerson, by said probate court, on the 12th January, 1867. The accounts and vouchers of said Wilkerson, for a final settlement, were filed on the 28th March, 1867; and the settlement was made on the 13th May, 1867, when the following decree was rendered by the probate court.

“This being the day heretofore appointed for examining the accounts and vouchers of Jesse Wilkerson, special administrator of James Wright, deceased, for the final settlement of his administration of said estate, and publication having been made as required at a former term, the court proceeded to examine, audit, and state the same; James M. Baker, the guardian *ad litem* appointed on behalf of the minors interested, and who are non-residents, appearing, and contesting the same; and it appearing, from said account, that said special administrator has received no money of said estate, and that, in accordance with the order of this court, he has turned over to the administrators in chief, appointed to succeed him, all the property of the estate returned by him in his inventory and appraisement, except such as has been accounted for properly, and to the satisfaction of the court; and it further appearing that said special administrator claims commissions, by way of compensation for his services, and also compensation to the attorney employed to counsel him in the management of said estate,—the court proceeded to examine and determine said matters; and being uncertain as to whether or not a special administrator is by law entitled to commissions, the account of said special administrator is disallowed; and the charge of the attorney appearing from the proof

to be reasonable and just,—it is ordered, adjudged, and decreed by the court, that Jesse Wilkerson, the special administrator as aforesaid, be, and he is hereby, allowed the sum of four thousand dollars, as compensation for his services as such administrator ; and that John A. Lewis, the attorney, be allowed the sum of two thousand dollars for his services ; and it is further ordered, that said special administrator be discharged from further liability in this behalf."

The administrators in chief reserved the following bill of exceptions on the hearing: "At a regular term of the probate court of Russell county, held on the 13th May, 1867, said special administrator filed his accounts for a final settlement of his special administration, and asked the court for its decision thereon, and also for an allowance for compensation for his services as such special administrator, and for counsel fees for his attorney, for professional services rendered during said administration; and, in support of his application, submitted the following evidence:

"Jesse Wilkerson, the special administrator, testified, that, on the 2d Monday in January last, he was appointed special administrator of the estate of James Wright, deceased, by the probate court of Russell county, and gave bond in the sum of two hundred thousand dollars. On the 22d of January, he made an inventory of all the personal property of said estate in said county of Russell, consisting of his stock, provisions, plantation utensils, cotton, household furniture, accounts, &c., which were appraised at one hundred and six thousand dollars; all of which property was on the Oswichee Bend plantation, some twenty-five miles from the court-house, and about the same distance from the residence of the special administrator. The amount involved being very large, and in view of the responsibility connected with the management of so large a trust, he employed John A. Lewis, esq., an attorney-at-law, resident at Crawford, to counsel him in said administration. John A. Lewis, as his legal adviser, accompanied him to the plantation, and was present, counselling and advising him, at every step in making said inventory and appraisal. There were two points especially, upon

which he felt solicitous, and upon which he required the advice of his legal counsel. There was a large amount of cotton, say some six hundred and thirty bales of cotton, valued at some \$85,000, in store on the plantation, liable to be stolen or burned; and as administrator he felt great concern about his liability for the safe keeping of this cotton. There was, also, a handsomely and expensively furnished residence, for the proper care of which he felt anxious. Upon these points he was advised and governed by his counsel. There were, also, two summonses in garnishment served upon him, as special administrator, at the instance of two attaching creditors of heirs of the estate; one of said suits being for nine or ten thousand dollars, and the other for one thousand dollars. In these cases, he was advised by the same counsel, whom he consulted as to his liability, if he turned over the assets of the estate in his hands to the administrators in chief, without reserving a sufficiency of assets to meet any judgment that might be rendered against him. Acting upon the advice of his counsel, he retained in his hands one hundred and twenty-five bales of cotton, for this purpose. Subsequently, the garnishment in the case of the largest creditor was dismissed by the plaintiff in attachment, and the administrators in chief having executed a bond of indemnity, to secure him against all liability on the smaller demand, he turned over the whole of the cotton to the administrators in chief; all of which was done by him with the advice of his said legal counsel. As special administrator, he, on several occasions, perhaps as often as three times, visited the plantation, for the purpose of supervising the plantation, and advising with the agents in charge of the business, which was a very large one, employing some one hundred and sixty hands and some sixty mules, cultivating some two thousand acres in cotton, and four hundred in corn. On the 25th day of March last, John Gill Shorter and William H. Chambers were appointed administrators in chief; and he turned over to them all the property which had come into his hands, except the one hundred and twenty-five bales of cotton above alluded to, and the articles which had been consumed on the plantation since the

appraisement. The one hundred and twenty-five bales of cotton were afterwards turned over to the administrators in chief, as before stated. The cotton, in the appraisement, was valued at twenty-eight cents per lb.; and at the time it was turned over to the administrators in chief, it was worth twenty-two cents per lb. There had also been consumed on the plantation some three hundred dollars worth of the articles embraced in the inventory, such as corn, fodder, cotton-seed, &c.

“The special administrator also introduced William H. Chambers, esq., who testified, that he was an attorney-at-law; that he knew that John A. Lewis, esq., was the legal adviser of the special administrator, and, as such, had rendered the professional services testified to by the special administrator; that the said Lewis had consulted with the said Wilkerson in the garnishment cases referred to; and that without his counsel, Wilkerson would have been ignorant of his duty and liabilities, and the course adopted by said Wilkerson was in accordance with said Lewis' advice; that it was customary, and, in the opinion of the witness, proper, that lawyers, in charging for their professional services, should consider not merely the amount of labor performed, but also the amount of money involved in the cases in which they were employed. Witness also gave it as his opinion, that no one, unacquainted with the law, could safely assume the responsibility of administering large estates, and that the legal advisers of administrators should be well compensated. It was also in evidence, that the cotton on the plantation belonging to said estate was not misused by the special administrator; and also that, at the time of Wilkerson's appointment as special administrator, William H. Wright, one of the heirs-at-law of said estate, was living on the plantation in Oswiechee Bend, and had charge of the same as general agent for the heirs; that he was left in charge of the same by the said Wilkerson, who did not, in any way, interfere with the business as he found it going on at the time of his appointment, and that the said William H. Wright is still residing on the plantation. John A. Lewis, esq., testified, that he is an attorney-at-law; that he rendered the services to the special administrator above

referred to, and that, in his opinion, his professional services were worth two thousand dollars; in which estimate he embraces an estimate of five per cent. on the amount involved in the garnishment cases referred to.

"The above was all the evidence adduced in the case; and upon this proof, the special administrator claimed an allowance of five per cent. upon the amount of his inventory, as allowed by law, amounting to five thousand three hundred dollars; which the court refused to allow, but decreed an allowance of four thousand dollars to the special administrator, as compensation for his services, and the additional sum of two thousand dollars for his counsel fees, for professional services rendered him by John A. Lewis, esq.; to each of which allowances said administrators in chief excepted."

The errors assigned are—"1st, that the probate court erred in decreeing the sum of four thousand dollars as an allowance for compensation to the special administrator"; and, "2d, that the probate court erred in decreeing to the special administrator an allowance of two thousand dollars for counsel fees."

JOHN GILL SHORTER, for the appellants.

JOHN A. LEWIS, *contra*.

BYRD, J.—We are of opinion, that special administrators are included within the term "administrators," as employed in section 1825 of the Code; and that the term "receipts," therein used, means pecuniary assets, and does not embrace assets which are not money or currency. The word "disbursements," in the same section, evidently means money or currency paid out in extinguishment of the liabilities of the decedent, or the expenses of administration. To the extent that a special administrator *may legally* receive the *money* assets of the estate, and disburse the same, he is entitled to commissions allowed by section 1825 of the Code; and the court should also allow actual expenses, and for special, or extraordinary services, such compensation as is just. Beyond this, the court is not authorized by law to go, in making an allowance to a special

administrator. Such special administrator is not entitled to commissions on the valuation of the assets of the estate.

[2.] The bill of exceptions sets out all the evidence introduced on the hearing; but neither the decree of the court, nor the record, discloses the items upon which the court made the allowance of four thousand dollars. In the case of *Pearson and Wife v. Darrington*, (32 Ala. 273,) this court, in speaking of allowances to administrators for services, said: "The uniform practice of the court is to refuse to make general allowances, without a specification of the items. The party must name and prove the particulars." This rule not having been complied with in this case, the allowance made by the court to the appellee can not be sustained on the evidence set out in the record.

[3.] The court rendered a decree in favor of John A. Lewis, esq., for two thousand dollars, for services rendered as attorney to the special administrator. We are not aware of any law, which confers on the probate court the authority to make an allowance or decree in favor of a person who is not a party to a proceeding in that court. The case of *Bates, adm'r, v. Vary, adm'r*, decided at the January term, 1867, (40 Ala. 421,) clearly indicates when an attorney's fee for services rendered an administrator should be allowed. Also, see head-notes 41, in the case of *Pearson and Wife v. Darrington, supra*.

Although all the evidence introduced on the hearing is set out, yet, there being no "specifications of the items" for which compensation is claimed, and no proof of the value of the services rendered, we can not render a decree in favor of the appellee on the evidence. On another hearing, this opinion, and the cases referred to herein, will furnish the parties and the court the rules and principles which may guide them in the ascertainment of a just compensation to the appellee, for his own expenses and services, and the services of his attorney.

Reversed and remanded.

HARRISON'S ADM'R vs. MEADORS AND WIFE.**[PARTIAL DISTRIBUTION OF DECEDENT'S ESTATE.]**

1. *When appeal lies.*—Under the provisions of the act approved December 12, 1857, (Session Acts, 1857–8, p. 244,) an appeal lies from a decree or order for the partial distribution of a decedent's estate, in favor of the personal representative, as well as in favor of the distributee.
2. *Notice to administrator.*—The case of *Brazeale's Adm'r v. Brazeale's Distributees*, (9 Ala. 491,) as to the necessity of notice to the administrator of the time when a final decree of partial distribution will be rendered against him, is overruled, in effect, by the case of *Allman v. Owen*, (31 Ala. 167,) and is hereby expressly declared to be overruled on that point; the correct rule being, that from the service of process, until the rendition of the final judgment or decree, the parties are presumed to be in court, and need no special notice of any order made in the cause.
3. *Form of decrees of partial distribution; amendment of clerical misprision.* On partial distribution of a decedent's estate, a separate decree should be rendered in favor of each distributee who applies for it; and a decree for the wife's distributive share should be rendered in favor of the husband and wife, for the use of the wife. But, if a joint decree is rendered against the administrator, in favor of the several distributees, for the sums ascertained to be due to them respectively; and a decree for the wife's distributive share is rendered in favor of the husband, "in right of the wife, and for her use,"—these are mere irregularities, which will be considered on error as amended.
4. *In whose favor decree of partial distribution may be rendered.*—On an application by a distributee, for partial distribution of a decedent's estate, under section 1778 of the Code, it is error to render a decree in favor of another distributee, who did not join in the application; but the rule is different, when the application is made by the administrator himself, under section 1771.
5. *Judicial notice of terms of court.*—The appellate court will take judicial notice of the day fixed by law for the commencement of the regular terms of the probate court; but, since the term is not confined by law to a single day, nor to any certain number of days, it can not be judicially known when any particular term ends.
6. *Presumption in favor of judgment.*—When it is necessary that a decree of the probate court, to be affirmed on error, should have been rendered at a regular term of the court, and the record does not affirmatively show that it was rendered at a special term, the appellate court will presume that the regular term was continued, from day to day, until the day on which the decree was rendered.

APPEAL from the Probate Court of Tallapoosa.

IN the matter of the estate of Carter B. Harrison, deceased, on the application of Thomas W. Meadors, and Martha Susan Meadors, his wife, for a decree of partial distribution. The petition of said Meadors and wife, which was filed on the 26th March, 1861, and sworn to by said Meadors, alleged that letters of administration on the estate of said Carter B. Harrison, deceased, were granted by said probate court, on the 4th July, 1856, to William T. Harrison; "that the said Martha Susan Meadors is entitled to one half of the estate of said decedent, he having left only one child"; and "that the assets of said decedent's estate are more than sufficient to pay the debts of said decedent." On the filing of the petition, the court ordered a citation to issue to the administrator, and appointed the 21st May, 1861, for the hearing of the application. On the 21st May, the cause was continued until the 25th June following; the continuance being granted, as the order shows, at the instance of the administrator, who appeared by attorney.

On the 25th June, 1861, the following decree was rendered in the cause: "This being the day to which said cause was continued, by an order of this court made and entered on the 21st day of May, 1861, for hearing the application of Thomas W. Meadors and his wife, Martha Susan Meadors, who is a distributee of said estate, asking for an order and decree of court that her distributive share may be paid to her; now come the said Thomas W. Meadors and wife, by their attorneys, Oliver, Garrett & Barnes, and move the court to proceed with such hearing; and it being shown that the proper notice and citation have been given to the said William T. Harrison, administrator as aforesaid, in all respects strictly according to the terms and requirements of said former order in the premises, the court proceeds to hear and to determine the matter of said application. Whereupon, it being shown to the satisfaction of the court, by due proof, that letters of administration upon said estate were granted to said William T. Harrison, more than eighteen months since, and it appearing to the court, from the report of said administrator for partial distribution, that the said Thomas W. Meadors and wife, Martha Susan Meadors, is entitled to the sum of nine thousand

dollars, and that Hicksey Hall Harrison, a minor, and heir of said estate, is likewise entitled to the sum of nine thousand dollars; that, after the payment of said distributive shares, there will remain a sufficiency of the assets of said estate to pay all the debts which have been presented, and charges: It is ordered, adjudged, and decreed, that the said application be, and the same is hereby granted; and the said William T. Harrison, as such administrator, is hereby directed to pay over to the said Thomas W. Meadors, for the use of the said Martha Susan Meadors, the said sum of nine thousand dollars, if the said Thomas W. Meadors, husband of the said Martha Susan Meadors, shall give bond and security, as required by section 1776 of the Code of Alabama, that being the distributive share to which she is entitled on partial distribution; and that he pay to the said John Morgan, who is the legally constituted guardian of Hicksey Hall Harrison, a minor, and heir of said estate, the said sum of nine thousand dollars, if the said Morgan shall give bond and security, as required by section 1776 of the Code of Alabama, that being the distributive share of said estate to which she is entitled on partial distribution. And it appearing to the court that the said William T. Harrison, administrator as aforesaid, has paid the said Martha Susan Meadors the sum of five thousand five hundred and forty-three dollars and fourteen cents, and filed his receipt for the said amount in this court, which said amount has been duly acknowledged by the said Meadors; now, on motion of the said Harrison, administrator as aforesaid, it is adjudged by the court, that said several payments made to the said Martha Susan Meadors ought to be, and the same are hereby accordingly, allowed to said administrator, to be deducted from the share adjudged in her favor by the said court, leaving a balance in her favor of three thousand four hundred and fifty-six dollars and eighty-six cents."

And on the 15th July, 1861, the following decree was entered in the cause: "In conformity to an order and decree of this court, entered and recorded on the 25th day of June, 1861, Thomas W. Meadors, the husband of Martha Susan Meadors, and John Morgan, the guardian of Hick

sey Hall Harrison, a minor, filed their respective bonds, as required by said order and decree, the same having been approved by this court. Thereupon, it is considered and decreed, that the said Thomas W. Meadors, in right of his wife, for her use, and John Morgan, guardian of Hicksey Hall Harrison, have and recover of the said William T. Harrison, administrator as aforesaid, the sums adjudged in their respective favors, for which execution may issue; in favor of Thomas W. Meadors, for the use of the said Martha Susan Meadors, for her share; in favor of John Morgan, guardian of the said Hicksey Hall Harrison, a minor, for her share. It is further ordered, that said bonds be recorded, and all the papers on file relating to this proceeding."

From this decree the administrator sued out an appeal, which, by consent, was considered as two separate appeals; and errors were assigned on each part of the decree.

STONE, CLOPTON & CLANTON, and GUNN & STRANGE, for the appellant.

WM. H. BARNES, *contra*.

JUDGE, J.—No appeal would lie, in favor of a personal representative, from a decree of partial distribution, until the passage of the act of December 12, 1857.—Acts, 1857–8, p. 244; *Johnson v. Fort*, 30 Ala. 78; *McAlister v. Thompson*, 32 Ala. 497. Under the provisions of the act above cited, the right of appeal, from any final order, judgment, or decree of the probate court, is extended to both parties; the right having before been confined, in cases like the present, to "the legatee, or person entitled to distribution."—Code, § 1838, sub-d. 4. We therefore hold, that the final order made in this case will support an appeal by the administrator.

[2.] The application for distribution, on the part of Meadors and wife, contains the essential requisites prescribed by the sections of the Code authorizing the proceeding. But it is contended, that the final decree of July 15, 1861, should not have been rendered, in the absence of notice to the administrator; and the case of *Brazeale's Adm'r v. Bra-*

zeale's Distributees, (9 Ala. 491,) is cited as authority to sustain this position. We consider that case as having been overruled, as to this question, by the later case of *Allman v. Owen*, 31 Ala. 167. The last mentioned case is in harmony with the general rule, which is undoubtedly correct, that from the service of process, until the final judgment, the parties are presumed to be in court, and need no further notice of orders taken in the cause.—*Younge v. Broxson*, 23 Ala. 127. The case of *Brazeale's Adm'r v. Brazeale's Distributees* being in conflict with this wholesome rule, we prefer to let that case stand overruled.

[3.] It is also contended, that the court below erred in not rendering a separate decree in favor of each distributee; and in rendering a decree in favor of "Thomas W. Meadors, in right of his wife, for her use," when it should have been in favor of the husband and wife, for the use of the wife. These, though irregularities, are not reversible errors, but are amendable in this court, and will be considered as amended. There is, therefore, no error in the proceeding as to Meadors and wife.

[4.] But the decree in favor of John M. Morgan, as guardian of Hicksey Hall Harrison, a minor, can not be sustained. No *application* for partial distribution had been made in behalf of the minor; and a decree for such distribution can only be rendered, in a proceeding like the present, "*on the application*" of the person entitled to it. Code, § 1778. The rule would be different in a proceeding under section 1771 of the Code.

The decree in favor of Meadors and wife must be affirmed; but the decree in favor of Morgan, as guardian, must be reversed, and the cause remanded. Let a judgment be entered in each case accordingly.

NOTE BY THE REPORTER.—On a subsequent day of the term, in response to an application by the appellees' counsel for a re-hearing, the following opinion was delivered:

JUDGE, J.—An application is made for a re-hearing in this case, to which we deem it proper to make a brief response. It is insisted, that the decree of the probate court

can not be affirmed on the principles decided in the case of *Allman v. Owen*, (31 Ala. 168,) because it does not appear to have been rendered at a *regular term* of the court. We judicially know that a regular term of the court was not fixed by law, to *commence* on the 15th of July, 1861, the day on which the decree was rendered; but, in the absence of any entry, or other thing of record, showing that the court held on that day was a *special term*, we must presume that it was a continuation of the regular term.—*Duval v. McLoskey*, 1 Ala. 710. See, also, *Davis v. Davis*, 6 Ala. 611. The regular terms of the probate court are not limited to a single day, but they may be adjourned from day to day, until all the business is disposed of. The record of the present case does not show regular adjournments and meetings of the court, until the day of the rendition of the decree; but not in any wise showing the contrary, we must presume such to have been the case. Otherwise, we should place the court in error, by intendment, when error does not affirmatively appear.

The application for a re-hearing is overruled.

BAKER vs. RUSSELL.

[MOTION AGAINST SHERIFF, FOR FAILURE TO MAKE MONEY ON FL. FA.]

1. *Construction of bill of exceptions, as to charge on effect of testimony.*—A recital in the bill of exceptions, that after the plaintiff's attorney had closed his argument, "the defendant's counsel was proceeding to argue the case, when he was interrupted by the court, and informed that he should charge the jury, if they believed the evidence, that the land was subject to levy and sale under the plaintiff's execution, and that the defendant, as sheriff, was liable in not making the levy; and in fact did so,"—affirmatively shows that the charge was given by the court *ex mero motu*, in violation of section 2274 of the Code. (A. J. WALKER, C. J., dissenting.)

APPEAL from the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THIS was a motion by William M. Russell, against Richard P. Baker, as the sheriff of said county, for a failure to make the money on an execution, when by due diligence it might have been made. The execution was for one hundred and ten 20-100 dollars, besides costs ; was founded on a judgment, which said Russell had recovered in said circuit court, on the 28th March, 1860, against one William G. Woods ; was issued on the 11th April, 1860, and went into the hands of said Baker, who was then the sheriff of the county, on the 28th April, 1860 ; and was by him returned, on the 10th August, 1860, endorsed "No property found." The motion was continued, from term to term, until the May term, 1866, when an issue was formed between the parties, under the direction of the court, and submitted to a jury ; and on the trial of the issue, the following bill of exceptions was reserved by the defendant :

"The plaintiff introduced one Nobles as a witness, who testified, that said William G. Woods, the defendant in execution, had in his possession, at the time plaintiff's said execution was in the hands of said sheriff, a tract of land in said county, containing one hundred acres, and worth five or six dollars per acre ; also, that said tract of land once belonged to him, (said witness,) and was sold by him to said Woods in 1856, or 1857, for five or six hundred dollars ; that said defendant paid him one hundred dollars in cash, and gave him a note on one Huguley, for about two hundred and fifty dollars. Said witness further testified, on cross examination, that he made a deed for said land to said W. G. Woods ; that some short time afterwards, at the request of said Woods, he took back that deed, and destroyed it, and made another deed, exactly like it, except that it was made to the wife of said Woods, instead of Woods himself. When asked who paid the last part of the purchase-money, the witness explained, that he did not recollect exactly who paid it—whether the said Woods or his wife—that it was paid among them. It was proved, also, that said Woods and his wife were married in Georgia, in

1846; that he was an intemperate and improvident man; that his wife was an industrious, frugal woman, and made money; that said Woods, and his wife and son, would some times make crops of cotton on said land; that said Woods some times got his share of it, and some times did not." The deed to Mrs. Woods, which was read in evidence, was dated the twentieth day of March, 1857, and recited as its consideration the present payment of eight hundred dollars by her. Evidence was also introduced, showing the value of the personal property on the place while said execution was in the sheriff's hands. "After one of the counsel for the plaintiff in the motion had closed his argument, the defendant's counsel was proceeding to argue the case, when he was interrupted by the court, and informed that he should charge the jury, if they believed the evidence, that the land was subject to levy and sale under the plaintiff's execution, and that the sheriff was liable in not making the levy, and in fact did so; to which charge the defendant, by his counsel, excepted. The personal property was neither passed on by the jury, nor adverted to by the court; but the whole case went off on the charge of the court, above alluded to, concerning the land. On the above charge being made, the attorneys on both sides agreed, that the entry should be, 'Jury and verdict for the plaintiff,' as shown in the judgment, with leave to the defendant to reserve an exception to said charge."

The charge of the court is now assigned as error.

LEWIS & PHILIPS, for appellant.

G. D. & G. W. HOOPER, *contra*.

A. J. WALKER, C. J.—The bill of exceptions informs us, that "after one of the counsel for the plaintiff in the motion had closed his argument, the defendant's counsel was proceeding to argue the case, when he was interrupted by the court, and informed that he should charge the jury, if they believed the evidence, that the land was subject to levy and sale under the plaintiff's execution, and that the sheriff was liable in not making the levy, and in fact did

so ; to which charge the defendant excepted." The majority of the court think, that the extract from the bill of exceptions above set out affirmatively shows that the charge on the effect of the testimony was given by the court *mero motu*, and that the judge was not required by either of the parties to give it ; and that, therefore, the court must be held to have violated that part of section 2274 of the Code which prohibits the court to "charge upon the effect of the testimony, unless required to do so by one of the parties."

In my opinion, the extract from the bill of exceptions affirms neither the one way nor the other, as to whether the charge was required ; and it is our duty to presume, in the absence of evidence to the contrary, that the court acted lawfully, and did not give the charge unasked. I think the judgment of the court below ought to be affirmed, upon two grounds—1st, that the bill of exceptions does not purport to set out all the evidence, and we must presume that the evidence justified the charge ; and, 2d, that if the evidence is all set out, the charge was correct, on the authority of *Gimon v. Davis*, (36 Ala. 589,) which holds, that the mere destruction of a deed does not divest the title of the grantee ; and of *Long v. McDougald*, (23 Ala. 413,) and *Coleman v. Hair*, (22 Ala. 596,) which show that the adverse possession of land, as against the defendant in execution, is no legal reason why it should not be levied on and sold. The majority of the court think it unnecessary to pass upon the merits of the case, because all the evidence does not appear to be set out.

In accordance with the opinion of a majority of the court, the judgment is reversed, and the cause remanded.

JEMISON & SLOAN *vs.* DEARING'S EXECUTORS.

[ACTION ON PROMISSORY NOTE, BY PAYEE AGAINST MAKERS.]

1. *Redundant evidence.*—The admission of redundant evidence is, at most, error without injury.
2. *Burden of proof, as to liability of partner on promissory note executed in partnership name.*—A promissory note, executed by one partner, during the existence of the partnership, and in the name of the partnership, is, *prima facie*, binding on the other partners, and throws on them the *onus* of disproving their liability; and this principle is applicable to limited partnerships.
3. *Abstract charge.*—A charge asked, which, although it may assert a correct legal proposition, is abstract, is properly refused.
4. *Liability of hirer, on note given for hire of slaves.*—The maker of a promissory note, given for the hire of slaves, may be liable thereon, although the slaves never went into his possession, since his failure to receive them may have been caused by his own refusal, and not by the fault of the owner.
5. *Variance in description of note.*—Under a complaint, in the form prescribed by the Code, for an action "by payee against maker," (p. 551,) charging the defendants as joint makers of a promissory note, a recovery may be had on proof of a note signed by them as partners, or executed by one of them, during the existence of the partnership, in the partnership name.

APPEAL from the Circuit Court of Tuscaloosa.

Tried before the Hon. JOHN HENDERSON.

THIS action was brought by the executors of James H. Dearing, deceased, against Robert Jemison and Fletcher Sloan; and was commenced on the 1st March, 1862. In the summons the defendants were described as "late co-partners, doing business under the firm name of Jemison & Sloan"; but the complaint contained no such description, and averred the cause of action to be "two promissory notes, made by them, as follows: one note for six hundred dollars, made by them on the 20th day of December, 1859, and payable to the plaintiffs' testator, on the 1st day of January, 1861; and the other note for three hundred and eleven 50-100 dollars, made by them on the 27th Decem-

ber, 1859, and payable one day after date, to plaintiffs' testator. A judgment by default was rendered against the defendant Sloan. The defendant Jemison pleaded the general issue, and *non est factum*; and issue was joined on these pleas.

On the trial, as the bill of exceptions shows, the plaintiffs read in evidence, after proving their execution, certain articles of partnership between the defendants, of which the following is a copy:

"Articles of partnership, between R. Jemison, jr., and Fletcher Sloan, made and entered into the 14th day of January, 1858. Whereas, said parties did, on or about the — day of —, in the year 1856, contract with the trustees of the Alabama insane asylum, to do the carpenter's and joiner's work of said hospital buildings, together with certain iron work connected therewith, as is more fully specified in their contract for the same; and whereas, the carpenters and laborers hired for said job could not be constantly and profitably employed therein, in consequence whereof other jobs and contracts were undertaken by said Sloan, and the same done by the hands hired for and employed about the hospital buildings: Now, therefore, to simplify the business, and to insure equality and justice to the parties, they agree as follows, to-wit: 1. They shall be joint and equal partners in all jobs or contracts, undertaken by said Sloan since the commencement on their contract with the trustees of the Alabama insane hospital, as well as in said hospital contract. 2. Said Sloan shall hire all necessary help, buy all necessary materials, and by and with the advice and consent of said Jemison, and generally to superintend the management and direction of the business, employment of hands, &c. 3. Said Sloan shall keep a correct account of all moneys received, or paid out; showing of whom received, to whom paid out, and on what account received or paid; and in all cases shall take the necessary and proper vouchers. He shall also keep regular time-tables, showing the time made by each hand, and at what work or job he was employed. 4. All contracts, amounting to two hundred dollars, shall be in writing, and copied in a book kept for that purpose. 5. The parties shall employ a general book-

keeper, whose duty it shall be to keep all books necessary for a full and proper understanding of the business, and to keep the same regularly and properly posted, to make such records, do all writing connected with the partnership, and keep such as may be given in his charge in proper files ; for which he shall receive such compensation as may be agreed upon. 6. Said Sloan shall monthly hand over to the general book-keeper his day-book, cash-book, time-book, as well as all other books, and memorandums of original entries necessary to a correct posting of the accounts, &c. 7. Books shall first be posted to the first of January, 1858, and a statement or exhibit made, showing as near as practicable the profit or loss up to that time. After the first of January, 1858, there shall be a like statement or exhibit made at the end of each quarter ; and if at the period of any exhibit, as in this article required, there shall be a surplus of funds over and above what may be necessary to carry on the business economically, such excess or surplus shall be divided ; provided, no division of profits shall be made on any unfinished job or contract, except the contract upon the insane hospital. 8. All books and papers shall at all times be accessible to, and free to the examination of either partner. 9. All labor hired, and all materials furnished, shall be charged at cost. 10. For his services in superintending and managing the business, said Sloan shall receive for his services prior to the first of January, 1858, the sum of ——— dollars, and after that time a salary of five hundred dollars per annum ; to be paid, in each case, out of the joint funds. 11. This partnership shall continue to the completion of this contract for the carpenter's work, &c., on the insane hospital buildings, and until notice of one of the partners of a desire for its dissolution ; and upon such notice the same shall be closed and settled up as early as practicable thereafter. In testimony whereof," &c.

The plaintiff then offered in evidence the two notes on which the action was founded, having first proved, by one Foster, that said notes were in the handwriting of the defendant Sloan, "and that said partnership continued to the end of the year 1859." Both of the notes were signed "Jemison & Sloan," and corresponded in dates and amounts

with the averments of the complaint; and the larger note purported to be given "for the hire of carpenters Bob and Alfred, for the year 1860." The court allowed the notes to be read in evidence, against the objection of said Jemison, "without further proof, but subject to the charge of the court as to their legal effect." The plaintiffs then offered in evidence two accounts, which were headed "Capt. J. H. Dearing, in account with Jemison & Sloan, Dr."; and to each of which was appended a receipt, dated December 27, 1859, and signed with the name of Jemison & Sloan. The items specified in the first account, were dated in May, November, and December, 1857, and consisted of items such as—"To Bob, two days, at \$2.00—\$4.00"; the aggregate amount being \$57.13. The items in the second account were dated in June, September, and October, 1859, and were all of the same kind as in the first, with the exception of a single charge for "shingles furnished, \$49.50"; the aggregate amount being \$166.13. The signatures to the receipts were proved to be in the handwriting of said Sloan. "On this proof, the plaintiffs offered to read said writings to the jury. The defendant Jemison objected to the reading of them as evidence against him, on such proof, and because they were irrelevant; which objections were overruled by the court, and said papers were read to the jury; to which the defendant Jemison excepted."

One Foster, a witness for the plaintiffs, who proved the handwriting of the articles of partnership, the notes, and the receipts appended to the accounts, "stated, also, that he was the book-keeper employed by said Jemison & Sloan under said articles of partnership; that said Sloan was a carpenter by trade and occupation, and said Jemison was not; also, that the said note for six hundred dollars was in the handwriting of said James H. Dearing, deceased; and that the date of the note had been altered, by blotting out the word *January*, and writing over it the word *December*. The plaintiffs also introduced Mr. Nicolson as a witness, who testified, that said James H. Dearing, deceased, was one of the commissioners who had the superintendence and management of the building of said asylum, with whom the contract for said carpenters' and joiners' work, referred

to in said articles of partnership, was made ; that said contract was not completed by Jemison & Sloan at the end of the year 1859 ; that another contract, for the completion of the work, was afterwards made by said Jemison alone, by whom it was done ; also, that said Dearing, Jemison, and Sloan, all lived in Tuskaloosa." The plaintiffs also offered in evidence a copy of a newspaper published in Tuskaloosa, which contained an advertisement, signed by said Jemison and Sloan, giving notice of the dissolution of their partnership. The advertisement was dated the 27th February, 1860, and stated that said partnership was dissolved on the 1st January, 1860 ; that all contracts, "prior to that date," would be finished by the late firm ; that all claims against the firm must be presented for settlement to Jemison, and that he would make settlements with all persons who were indebted to the firm.

"This being all the evidence in the case, the plaintiffs asked the court to charge the jury, that if they believed, from the evidence, that the notes were executed by Jemison & Sloan, Sloan signing the firm name, during the continuance of the partnership, it is not incumbent on the plaintiffs, in the first instance, to show that the note was given for a partnership transaction ; that it will be intended to have been made in the course of the partnership dealings ; and that if it was given for the individual debt of the partner making it, with the knowledge of the party to whom it was given, these facts must be shown in defense by the party taking advantage of them. The court gave this charge, and the defendant Jemison excepted.

"The defendant Jemison asked the court to charge—

"1. That if the jury believed, from the evidence, that the note for three hundred and odd dollars was given for a consideration not relating to the business of the partnership, and this was known to the payee, then the defendant Jemison is not liable on said note, unless he consented to the giving of said note in the name of the firm.

"2. That the defendant Jemison is not liable on the note for six hundred dollars, unless the jury believe, from the evidence, that the slaves named in the note went into the

possession of the defendants under the hiring mentioned in said note.

"3. That the plaintiffs were not, on the evidence in this case, entitled to recover against him on the note for three hundred and eleven 50-100 dollars.

"4. That the plaintiffs were not, on the evidence, entitled to recover against him on the note for six hundred dollars."

The court refused each of these charges, and the defendant Jemison excepted; and he now assigns as error all the rulings of the court, to which, as above stated, he reserved exceptions.

RICE, SEMPLE & GOLDTHWAITE, for appellants.—1. The principles applicable to commercial partnerships do not apply to a partnership like that which existed between the defendants in this case. The articles of partnership gave Sloan no authority to execute a note in the partnership name, and the law gave him none.—*Dickinson v. Valpy*, 10 Barn. & Cress. 128; 36 Penn. St. 504, and cases cited on page 507; 2 Hare, 218; 6 Cowen, 497; 18 Penn. St. 412; 24 *ib.* 320.

2. If the notes were given by Sloan, for a consideration not relating to the partnership business, and the payee had notice of that fact, the notes were not binding on Jemison, unless he consented to their execution. There was evidence from which the jury might have inferred the existence of these facts, and its sufficiency ought to have been left to the jury.—*Livingston v. Roosevelt*, 4 John. 276; *Dickinson v. Valpy*, 10 Barn. & Cress. 128; *Foot v. Sabin*, 19 John. 157; Story on Partnership, §§ 110-13; *Bignol v. Waterhouse*, 1 M. & S. 259; *Dow v. Sayward*, 12 N. H. 275; *Maltby v. N. W. R. R. Company*, 16 Maryland, 422; 2 Comstock, 479. If it be held that there is nothing in the evidence, as set out in the bill of exceptions, which tended to prove the existence of those facts, and that, for this reason, the first charge asked was abstract; the same objection applies to the affirmative charge of the court; and, since that charge asserted an incorrect legal proposition, it must work a reversal.

3. There was a fatal variance between the notes described

in the complaint, and the notes offered in evidence. A recovery could not be had against two joint makers of a promissory note, under a complaint which charged them as partners; nor can a recovery be had against partners, under a complaint which charges them as joint makers. The partnership is a material fact, which can neither be omitted, nor supplied by intendment.—*Willis v. Green*, 5 Hill, (N. Y.) 232; *Sayre v. Frick*, 7 Watts & Serg. 383; *Dalmey v. Stidger*, 4 Sm. & Mar. 749; *Hopkins v. Smith*, 11 Johns. 161; *Shepard v. Hawley*, 1 Conn. 367; 1 Parsons on Notes and Bills, 502.

WOOD & COOK, *contra*.—1. The plea of *non est factum*, though verified by affidavit, only required the plaintiffs to prove the existence of the partnership, and the execution of the notes, in the partnership name, by one of the partners.—Code, § 2278.

2. The existence of the partnership being shown, the execution of the notes by one partner, in the partnership name, is presumed to be binding on his copartner, in the absence of positive evidence to the contrary.—Parsons on Contracts, 151-70; Story on Partnership, §§ 101-02, 344; Story on Agency, §§ 37, 124; 3 Kent's Com. 40; 2 Ala. 502. The presumption is, that they were given for a consideration moving to the partnership, or relating to a partnership transaction.—6 Wendell, 615; 11 Johns. 544; 3 Ala. 11; 7 Ala. 20.

3. The first charge asked was abstract, and was properly refused for that reason, if for no other.—1 Porter, 139; 24 Ala. 458; 26 Ala. 576, 660, 728; 29 Ala. 200; 17 Ala. 249.

4. There was no variance in the description of the notes. The statute makes the notes joint and several.—Code, §§ 2142-3.

BYRD, J.—1. The accounts introduced in evidence, against the objection of the appellant Jemison, tended to prove the existence of the partnership, at and previous to the dates of the notes sued on; but, as the partnership was thus proven by other admissible and uncontroverted testimony, the admission of such accounts as evidence was

clearly an error without injury.—Shepherd's Digest, 568, § 90; *Jemison v. Smith*, 37 Ala. 185; *Mauldin v. Br. Bank at Mobile*, 2 Ala. 502.

2. When one partner affixes the name of the firm to a promissory note, during the existence of the partnership, the partners are, *prima facie*, liable thereon; and if any member thereof seeks to avoid his liability, the burden of proof lies upon him to make out his defense. Such is the rule in America.—Parsons on Partnership, 201, 202, and notes *b* and *c*; *Rabey v. O'Grady*, 33 Ala. 257; and see authorities cited on the brief of counsel for appellee. There is no testimony in this case, which brings it within any exception to the rule, or its application. The fact that the partnership was a limited one, as shown by the articles executed by the appellants, does not affect the operation of the rule in this case. Persons who form a partnership, thereby, as to third persons, constitute each other agents to carry on the joint business, and vouch for the integrity of each other; and the law therefore presumes that the act of each, in the name of all, is within the scope of the joint business; and if not, it devolves on the partnership to show it. Such we understand to be the reason and result of the rule. The charge given by the court, upon the evidence set out in the record, and properly admissible, is in substantial conformity with the rule above laid down, and, consequently, correct.

3. The first charge asked by the appellant, announces a clear proposition of law; but there is no evidence in the record, upon which the jury could have made any application of it; and the refusal of the court to give it did no injury to any one.

4. As to the second charge asked, we remark, that a person may have given a note for the hire of slaves, and be liable thereon, although the slaves never went into the possession of the hirer. If, by the fault of the owner, the hirer failed to obtain the possession, the latter would not be liable for the hire. But if, at the time the delivery of possession was to take place, the hirer should refuse to receive possession, or did any act which prevented the owner from delivering possession, it seems that the owner might

still recover upon a note given for the hire. If the correctness of the charge were conceded, still, when construed with reference to the testimony, it is abstract; *ergo, error absque injuria*.

5. The third and fourth charges asked may be disposed of together. It is contended that, as the complaint seeks to charge the defendants therein as joint makers of two promissory notes, and not as partners, there is a variance between the complaint and the proof, and that therefore the court should have given these charges. Upon the authority of the cases hereafter cited, and under the effect of sections 2143, 2227, and 2228 of the Code, we hold that, upon a complaint in the form of this, a recovery may be had, by the introduction of a note made by the defendants as partners. They are sued as joint makers of a promissory note; and proving that they executed it as partners, meets the requirements of the rule as to a substantial conformity between the allegations of the complaint and the proof, and authorizes a verdict and judgment in favor of the plaintiff. There is nothing in the Code, which inhibits a partnership note from being given in evidence under a complaint in form of the last on page 551 of the Code, *if* the plaintiff is the payee in the note, and the defendants are the makers, although executed by one, in the firm name. A surviving partner may be sued on a partnership debt, and a recovery had, without averring that it was a partnership debt.—1 Tidd's Pr. 6; 1 Chitty's Pleadings. And the Code having declared, that the liability of partners is several, and therefore either might be sued on a partnership liability, it would seem to follow, from the foregoing doctrine, that partners may be declared against as joint makers of a promissory note executed in the partnership name, without averring that it was executed by them as partners, or that it was a partnership liability, and a recovery had on proof that the note was executed by one of the partners in the firm name. *Maynard v. Fellows*, 43 N. H. 255; *Tattle v. Cooper*, 10 Pick. 281; *Cutts v. Gordon*, 13 Maine, 478; *Reddington v. Farrar*, 5 Greenl. 379; *Hartness v. Thompson*, 5 Johns. 160; *Ander-son v. Henshaw*, 2 Day, 272; Parsons on Partnership, 349.

The judgment of the circuit court is affirmed.

RUSSELL vs. ERWIN'S ADM'R.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Appointment of general administrator.*—In an action brought by the general administrator of Mobile county, it is not necessary that the order appointing him should affirmatively show that he was nominated and recommended for the office by the court of county commissioners, as required by the act approved December 14, 1859: the probate court being a court of general jurisdiction as to such matters, every reasonable intendment will be made in favor of the regularity of its proceedings, when collaterally assailed.
2. *Same; resignation.*—A recital in the order appointing such general administrator, that the preceding general administrator had "duly resigned," coupled with such appointment, is sufficient, in a collateral proceeding, to show that the resignation had been accepted by the court, as required by the act approved December 12, 1857.
3. *Revivor of action by general administrator.*—An action brought by the general administrator of a county, who afterwards resigns, may be revived (Code, § 1925) in the name of the succeeding general administrator; and if the revivor is made without objection on the part of the defendants, they can not raise any objection to it at a subsequent term.
4. *Admissibility of parol evidence to vary written lease.*—Parol evidence is admissible, to show that a written lease, which purports on its face to have been made by an administrator in his own name, was in fact made for the benefit of the estate.
5. *Admission of landlord to defend; admission of evidence competent against one defendant only.*—An order of the court, admitting one of several defendants in ejectment to defend as landlord, does not deprive the plaintiff of the right to introduce evidence on the trial which is competent only against the other defendants: the landlord may protect himself against the effect of such evidence, by a request for appropriate instructions to the jury.
6. *Amendment of clerical misprision.*—In an action against several defendants, if the judgment is erroneously entered up against one of them only, this is not a dismissal or discontinuance of the action as to the others, but is a mere clerical misprision, which will be considered on error as amended.
7. *When administrator may sue.*—In this State, the administrator of a solvent estate may maintain ejectment, or a real action in the nature of an action of ejectment, for the land of the intestate.

APPEAL from the Circuit Court of Mobile.
Tried before the Hon. C. W. RAPIER.

THIS action was brought by F. G. Kimball, who was the general administrator of Mobile county, and who sued as the administrator *de bonis non* of Isaac H. Erwin, deceased, against James W. Russell, Ellen Thompson, and Theodore Petit, to recover the possession of four city lots in Mobile, with damages for their detention; and was commenced on the 31st May, 1858. The complaint was in the form prescribed by the Code, (p. 555,) "for the recovery of land, or the possession thereof, in the nature of an action for ejectment." At the May term, 1859, the defendant Russell asked leave to defend as landlord of the premises; "which leave," the minute-entry recites, "is granted, and thereupon said defendant filed his pleas." The transcript next contains seven pleas, which purport to be filed by "the defendants Petit and James W. Russell, who is now made defendant in the place of said Thompson"; the defendants' names, as stated in the margin of the pleas, being "*Edward J. Thompson and Theodore Petit.*" The separate pleas of the defendant Russell are then set out, which were pleaded "in short by consent"; namely, the general issue, and adverse possession for three years, with a suggestion of valuable improvements. The next entry in the transcript, which is without date, and in which the names of the defendants are stated as "Ellen Thompson, *et al.*," is in these words: "James W. Russell, the landlord of the above-named defendants, appears as a defendant to the above-stated case, and asks to be made the sole defendant in said suit; and receives a declaration for the premises sued for in this action, for which he intends to defend, and pleads the general issue thereto," &c., and adverse possession, with a suggestion of valuable improvements. The next entry in the cause, which is entitled of the May term, 1860, and states the names of the defendants as Ellen Thompson, James Russell, and Theodore Petit, is as follows: "Came the parties, by their attorneys, and the *defendant* suggests, that he, and those under whom he holds, have had adverse possession of the land sued for, for three years next before the bringing of this suit, and have made permanent and valuable improvements thereon," &c.; then reciting that the plaintiff had leave to amend his complaint, by correcting a

misdescription of the premises sued for, and dismissed his suit against Ellen Thompson; that thereupon came a jury, who returned a verdict for the plaintiff; and then follows the judgment of the court, "that the plaintiff recover from the *defendant* the lots described in the complaint," &c. This judgment was reversed by this court, at its June term, 1861, on appeal by the defendant Russell, and the cause was remanded.—See the case reported in 38 Ala. 44–51.

At the December term, 1865, as the next entry in the transcript recites, "came the parties, by their attorneys, and the plaintiff has leave to amend his complaint fully; to which the *defendants* assent; and W. W. McGuire, administrator *de bonis non*, with the will annexed, of Isaac H. Erwin, deceased, is made a party plaintiff, on his motion, in lieu of Franklin G. Kimball, administrator *de bonis non*, &c., resigned." The amended complaint, as copied in the transcript, is entitled of the "Fall term, 1858," and states the names of the parties thus: "Franklin G. Kimball, adm'r, v. Ellen Thompson, James Russell, and Theodore Petit."

In the entry at the May term, 1866, Russell is the only person named as defendant in the margin; and the entry states, that the defendant moved the court to strike the cause from the docket, "on the ground that W. W. McGuire, adm'r, &c., is improperly made a party"; but the motion, as copied into the bill of exceptions from the motion docket, states the names of the defendants to be "J. W. Russell *et al.*" The bill of exceptions states, that this motion "was heard by the court, upon the record proof from the probate court of Mobile, showing the successive appointments of Mrs. Rebecca Erwin, Robert D. James, F. G. Kimball, and W. W. McGuire, to the administration of the estate of said Isaac H. Erwin, deceased, and upon no other evidence." The court overruled the motion, and the defendant Russell excepted.

The transcript from the records of the probate court, which was made an exhibit to the bill of exceptions, shows that letters of administration on the estate of said Isaac H. Erwin, deceased, *cum testamento annexo*, were granted to Mrs. Rebecca Erwin, his widow, on the 11th day of April, 1845; that Mrs. Erwin resigned the administration on the

3d January, 1851, and, on the same day, letters *testamentary* were granted to Robert D. James; that said James filed his resignation on the 16th December, 1854; that on the 23d December, 1857, letters of administration *de bonis non* on said estate were granted to said F. G. Kimball, as the general administrator of Mobile county; that said Kimball "presented his resignation as such administrator" on the 13th September, 1864, and it was thereupon ordered by the court, "that said resignation be filed and recorded"; and that letters of administration *de bonis non* were granted to said W. W. McGuire, as the general administrator of the county, on the 25th January, 1865, the order appointing him being in the following words: "Franklin G. Kimball having duly resigned as administrator *de bonis non*, in this court, of said estate, with the will annexed of said deceased, more than thirty days since; now, upon the application of Wesley W. McGuire, the administrator general of this county, made in writing, and under oath,—it is ordered, that he be appointed to administer the estate of said deceased, wherein the same remains unadministered, and that the proper letters of administration *de bonis non*, with the will annexed of said deceased, issue to him; and the said McGuire is directed, under this appointment, to proceed with said administration according to law."

On the trial, as the bill of exceptions further states, the plaintiff offered in evidence a lease from Mrs. Rebecca Erwin to Edward J. Thompson of the premises sued for, which was dated the 1st November, 1849, and which consisted of two distinct parts. The first part, which was signed by said Thompson, acknowledged the acceptance of the lease by him "from Mrs. Rebecca Erwin, adm'r^x," &c., and specified the stipulations of the contract on his part; while the second part, which was signed "W. J. Ledyard, for Mrs. R. Erwin," contained the stipulations of the contract on the part of the lessor. The term of the lease was three years, to commence from its date; and the stipulated rent was sixty dollars *per annum*, payable quarterly in advance. "In connection with said lease, plaintiff offered to prove, by said W. J. Ledyard, that he took the lease from said Thompson, who made it, as agent for Mrs. Rebecca Erwin, as the

administratrix of the estate of said Isaac H. Erwin, deceased, and took it for the benefit of said estate. The defendant objected to the admission of the lease, and to the evidence of said Ledyard, severally; because he (the defendant) was not shown to be a party or privy to said lease, and because it was made to Mrs. Rebecca Erwin, and not to her as administratrix *de bonis non*, with the will annexed, of the estate of Isaac H. Erwin, deceased. The court overruled said objections, and allowed said lease and evidence to go to the jury; to each of which rulings said defendant excepted."

"Said Ledyard further testified, that he arranged for said lease with the wife of the lessee, who was the mother of the defendant, and that she continued to pay the rent reserved by the lease for some considerable portion of the term therein specified. There was evidence that said Thompson was the stepfather of the defendant, with whom the defendant, then a minor, was living at the date of the lease. The defendant set up and introduced evidence, tending to show adverse possession, by and for him, for more than ten years before this suit was brought, under color of title; and there was no other evidence given or offered of the right of the lessee and his wife to represent the defendant in attorning to Mrs. Erwin, than what is shown by the lease and the testimony of said Ledyard, as aforesaid. Said testimony of defendant tended to show, that before the making of the said lease, and at that time, his mother held the possession of the property sued for, for him, and that said possession was obtained by her from a third person, who held adversely to Erwin and his estate." The transcript from the records of the probate court, above mentioned, showing the several grants of letters of administration on Erwin's estate, were read in evidence by the plaintiff; and the bill of exceptions states, that it "was the only evidence introduced to show a right in the plaintiff to maintain the action on the right or title of said decedent or his estate." The defendant asked the court to charge the jury, "that the plaintiff could not recover on any right or title in Isaac H. Erwin or his estate"; which charge the court refused to give, and the defendant excepted to its refusal.

The several rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

W. BOYLES, and THOS. H. HERNDON, for appellant, made these points: 1. The proviso to the act approved December 12, 1857, declares that the general administrator of Mobile county may resign his administration on any particular estate committed to him, "by leave of the probate court of his county."—Session Acts, 1857-8, p. 302. The order appointing McGuire does not show that Kimball had resigned the office of general administrator of the county by leave of the court, or that his resignation had been accepted by the court. The appointment of McGuire, therefore, is void for want of jurisdiction, since there can not be two administrations on the same estate at one and the same time. *Matthews v. Douthitt*, 27 Ala. 273.

2. Under the proviso to the act approved December 14, 1859, the general administrator of Mobile county is required to be recommended and nominated by the court of county commissioners.—Session Acts, 1859-60, p. 551. The object of this statutory provision was to limit and restrict the power of the probate judge in appointing general administrators. He can not legally make any appointment, until the person appointed has been nominated and recommended by the county commissioners; and any appointment made by him, without such appointment and recommendation, is null and void for want of jurisdiction.—27 Ala. 273, 608; 29 Ala. 510; 22 Ala. 484; 18 Ala. 694; 15 Ala. 134; 11 Ala. 310. This statutory provision takes the case out of the influence of the case of *Bradley v. Broughton*, (34 Ala. 705,) and makes the validity of the appointment depend, not on the court by which it is granted, but on the person appointed.

3. The record from the probate court was the only evidence offered by the plaintiff, to show his right to maintain the action. If it be held that the record, aided by intendment, shows the resignation of Kimball, and the recommendation and nomination of McGuire; still it is defective, because it does not show the appointment of McGuire as

the general administrator of the county, though that fact is recited in the order granting him administration on the estate of Erwin. A record is not evidence of any fact which can only be inferred from it by argument.—*McCravey v. Remson*, 19 Ala. 430; *Miller v. Jones*, 29 Ala. 186; 1 Greenl. Ev. 519.

4. The order admitting Russell to defend as landlord, estops not only the tenants, but the plaintiff also, from denying that fact. If he was not the landlord of the other defendants, the order admitting him to defend as landlord, and dismissing the action as to the other defendants, amounted to a discontinuance of the case.—*Adams on Ejectment*, 293; 1 B. Monroe, 233; 5 Monroe, 540.

5. The lease from Mrs. Erwin to E. J. Thompson was not competent evidence against the defendant Russell, since he was neither a party nor privy to it. If Mrs. Ellen Thompson, the mother of Russell, held possession for him, she could not affect his rights by attorning to a stranger. Being a tenant under him, or holding for him, she could not do anything that would affect his title.—38 Ala. 44; 1 Rawle, 408; 2 Humph. 562; 10 Watts, 67; 12 Wendell, 105; 14 Serg. & R. 382; 8 Watts & Serg. 536; 5 Cowen, 291. Russell was a minor at the time the lease was accepted by Thompson, and therefore could not be bound by it.

6. The lease was not competent evidence in this case, because it was not made by Mrs. Erwin in her representative character, and parol evidence was not admissible, to vary, contradict, or add to its terms.—*Innerarity v. Kennedy*, 2 Stewart, 159; 12 Ohio St. R. 202; 6 *ib.* 4; 2 Parsons on Contracts, 61; 1 Greenl. Ev. § 275; 12 Johns. 490; 5 Cowen, 144; *Thorpe v. Sughi*, 33 Ala. 330; 17 Mass. 571; 8 Metcalf, 59; 17 Ala. 38; 10 Ala. 116; 1 Hilton, N. Y. 61. The lease does not show, on its face, that Ledyard was the agent of Mrs. Erwin, the administratrix; and that fact can not be proved by parol.—4 Duer, N. Y. 29; 24 Barbour, 39, and cases there cited.

E. S. DARGAN, and JOHN HALL, *contra*.—1. The court did not err in refusing to strike the cause from the docket.—

Gray v. Cruise, 36 Ala. 559; *Ikelheimer v. Chapman*, 32 Ala. R. 676.

2. The record of the probate court shows enough to sustain the plaintiff's appointment, when collaterally assailed. *Ikelheimer v. Chapman*, 32 Ala. 676; *Comstock v. Crawford*, 3 Wallace, U. S. 396.

3. The right to revive the action, in the name of the succeeding administrator, is unquestioned.—Code, §§ 1683, 1737, 1751, 1754, 2158. The right of the administrator to maintain the action is asserted in *Golding v. Golding*, 24 Ala. 122; see, also, *Caller v. Boykin*, 1 Minor, 206; *White v. Beard*, 5 Porter, 91; *Elliott v. Eslava*, 3 Ala. 568.

4. The evidence of Ledyard, in connection with the lease, was admissible.—*Steele v. McTyer*, 26 Ala. 487; *Br. Bank v. Coleman*, 20 Ala. 140; 26 Conn. 328.

JUDGE, J.—The act of the legislature authorizing the appointment of a general administrator and general guardian for Mobile county, approved December 14, 1859, (Acts 1859-'60, p. 551,) provides, "that the court of county commissioners of said county shall recommend and name the person to be appointed such administrator and guardian." It is contended that the order of the probate court, committing the administration of Erwin's estate to McGuire, the appellee, as the administrator general of Mobile county, is void, because the order fails to show that McGuire had been appointed such administrator general, pursuant to the requirements of the act of the legislature above cited. This position we hold to be untenable. The jurisdiction of the probate court, as to the granting of letters testamentary and of administration, is conferred by the constitution of the State, and is original, general, and unlimited.—*Ikelheimer v. Chapman's Adm'rs*, 32 Ala. 676; *Gray's Adm'r v. Cruise*, 36 Ala. 559. It is, to this extent, a court of general, not of limited, or special jurisdiction; and, in accordance with a well-established rule, every reasonable intentment will be made, in order to support the jurisdiction when assailed, especially when it is brought in question collaterally. We must, therefore, intend that McGuire was appointed administrator general of Mobile county, in con-

formity to the requirements of the act of December, 1859.

2. The act of December 12, 1857, "to prescribe the duties, rights, and liabilities of general administrators, where they resign their office," provides, that the resignation of his office by any general administrator shall not operate to discharge him from the administration of any estate previously committed to his charge as such general administrator; but that he may be removed from the administration of any such estate for cause, "or may resign his administration thereon, by leave of the probate court of his county." Previous to the appointment of McGuire, administration on the estate of Erwin, deceased, had been committed to one Franklin G. Kimball, as general administrator of the county; and he had resigned the trust. It is contended that it does not appear that Kimball's resignation was by leave of the court; that in that event alone could he legally resign; and that, therefore, the appointment of McGuire was illegal and void. The order appointing McGuire recites, that Kimball had "duly resigned" his administration; and the appointment of McGuire to succeed Kimball in the administration, coupled with the recital stated above, makes it sufficiently clear that the probate court had sanctioned the resignation of the latter.

3. McGuire, as the successor in the administration, was properly made a party plaintiff, on motion, in the court below. Section 1925 of the Code expressly authorized it; and, besides, no objection was made to it, at the time the motion was granted. Therefore, the motion made at a subsequent term of the court, to strike the cause from the docket, on the ground that McGuire, as administrator, had been improperly made a party, was rightfully overruled.

4. The rule of law is well settled, though there is sometimes difficulty in its application, that if a written instrument is perfect and complete of itself, parol evidence can not be received to add another term to it, or to change its legal effect. This rule was not violated in permitting the witness Ledyard to testify that he, as the agent of Mrs. Rebecca Erwin, as administratrix of the estate of Isaac H. Erwin, deceased, took the lease from Thompson for the benefit of said estate. Parol evidence, it has been held,

may be received, without doing violence to the rule stated, which shows for whose benefit a contract is executed, or which shows that a contract was that of another person than him in whose name it is executed.—*McTyer v. Steele et al.*, 26 Ala. 487; *Branch Bank v. Coleman*, 20 Ala. 140.

5. The lease, and, in connection therewith, the evidence of the witness Ledyard, were competent evidence, notwithstanding the defendant Russell was neither a party nor privy to the lease. The suit was originally brought against Ellen Thompson, James Russell, and Theodore Petit. At a term of the court before the trial, Russell, *though already a party defendant*, asked and obtained leave of the court to defend the suit as landlord of the premises. At a subsequent term, as appears from a recital of the record, he asked leave to be made the sole defendant to the suit; but no action of the court appears to have been had on this motion. At a term of the court still subsequent to this, the plaintiff moved for leave to "amend his complaint fully;" to which the defendants assented. Thereupon, an amended complaint was filed, on which the case was tried, embracing the same parties defendant, viz., Ellen Thompson, James Russell, and Theodore Petit. Ellen Thompson being a party defendant, it was for this, if for no other reason, competent to introduce the lease in evidence, and to show her connection therewith, and the payment of rent by her, thereunder. The plaintiff was not deprived of his right to introduce this evidence, by the leave which had been granted to Russell to defend as landlord; and such would not have been the effect, even if Russell had not been an original party defendant.—*Davis v. McKinney et al.*, 5 Ala. 719; *Noble v. Coleman and Gunter*, 16 Ala. 77. It was competent for the defendant Russell to protect himself against any illegal effect of the evidence, by the asking of an appropriate charge from the court.

6. The plaintiff's action was not dismissed or discontinued as to either of the defendants. As before stated, the case was tried on a complaint which embraced each one as a defendant; though the judgment-entry may be construed to be against Russell alone. But if this be so, it is a clerical misprision, which is amendable, and not available on

error. This court will not consider of such error in the first instance.—*McDowell v. Mitcham*, 37 Ala. 417; also, *Amarine v. McCaskle*, 12 Ala. 17.

7. The court was requested by the defendant to charge the jury, "that the plaintiff could not recover on any right or title in Isaac H. Erwin, or his estate; which charge the court refused to give, and to which refusal the defendant excepted." The bill of exceptions does not purport to set out all the evidence of title in Erwin or his estate; and the charge requested raises no question in regard to the sufficiency of that title to authorize a recovery. Having determined that McGuire was lawfully the administrator of the estate, the only question presented by the charge is, as to whether the administrator of a solvent estate may, in this State, maintain ejectment for the lands of his intestate. This question has been settled in the affirmative by this court; and, consequently, the court below did not err in refusing to give the charge.—*Golding v. Golding's Adm'r*, 24 Ala. 122.

It does not appear that the defendant Russell was in any manner estopped from controverting the title of the plaintiff, or asserting a superior outstanding title to the premises sued for, in himself, if any such existed.

There being no reversible error in the record, the judgment of the circuit court is affirmed.

KASTER vs. McWILLIAMS.

[MOTION AGAINST SHERIFF, FOR FAILURE TO MAKE MONEY ON FL. FA.]

1. *Exemption of homestead from levy and sale under execution.*—A house and lot, which are not in the actual possession of the defendant in execution, but are rented out, are not exempt from levy and sale under execution against him, under the statute (Code, § 2462) which exempts the homestead.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN K. HENRY.

THIS was a motion by Henry Kaster, against E. C. McWilliams, as the sheriff of said county, for failing to make the money on an execution, when by due diligence it might have been made. The execution was founded on a judgment for one hundred and twenty-seven 80-100 dollars, besides costs, which said Henry Kaster recovered in said circuit court, on the 19th April, 1860, against one Daniel McLaughlin; was issued on the 7th August, 1866; came to the hands of said McWilliams, as sheriff, on the next day; and was by him levied, on the 10th August, 1866, on a house and lot in the town of Camden, containing about ten acres. The defendant in execution having claimed the house and lot, as exempt from levy and sale under the statute, and having made the statutory affidavit prescribed in such cases, the sheriff thereupon summoned three disinterested freeholders, to assess the value of the property; by whom one half of the lot, including the house, was assessed at five hundred dollars. The other half of the lot was sold by the sheriff, after due advertisement, for twenty-five dollars; of which sum, after paying costs, a balance of eighteen dollars was applied to said execution; and the sheriff returned the execution on the 11th October, 1866, stating these facts in his return. The motion was heard and determined by the court, at its October term, 1866, without the intervention of a jury. "It was in evidence before the court," as the bill of exceptions states, "that at the time said execution was issued, received, and levied by the sheriff, and continuously up to the hearing of this motion, said McLaughlin, the defendant in execution, was the owner of the said house and lot in said county, on which said execution was levied by the sheriff, and which was correctly described in said levy; that said McLaughlin, in November, 1865, moved from Wilcox county, with his family and furniture, into Dallas county, and occupied with his family a rented house in Selma; that in November, 1865, before said removal, he rented out said house and lot in Camden to one Marquis, who went into the possession of said premises

as his tenant, and has ever since remained in possession under said contract of lease, which has not yet expired. This being all the evidence on the trial, the court overruled the plaintiff's motion, and decided that the premises so levied on, and which had been set apart by the freeholders as aforesaid, to the value of five hundred dollars, were exempt from levy and sale under execution; to which ruling and decision said plaintiff excepted," and which he now assigns as error.

COCHRAN & DAWSON, for appellant.

S. J. CUMMING, *contra*.

A. J. WALKER, C. J.—The only question of this case is, whether a house and lot, not occupied by the owner, but rented out, can be exempt from levy and sale. Is the exemption dependent upon the fact, that the family has the place in actual use? The exemption of real property is for the use of the family, and must be such as may be selected by the head of the family, to include the homestead. We think the statute clearly contemplates that there should be an actual use by the family. This is demonstrated by the provision that the exemption is for the use of *the family*—that the *retention* is for the use of *the family*. The renting of land may be a source of profit, which contributes to the support of a family; but that is not the sort of use intended. The land, when rented, does not, of itself, *in the use of the thing*, supply "the comforts, wants, and requirements of the family." The statute contemplates *the use of the thing*, not of its profits, or of an income derived from it. The family could only be said to be in the use of land rented, when it enjoyed the money arising therefrom. The money thus derived is not exempt; and it would be absurd to say that the land is in the use of the family, because the rent goes to maintain it, and is therefore exempt; and yet the rent, when received, is liable to the claims of creditors. The principle that the *thing* exempted must be so in the use of the family as to supply its comforts, wants, or requirements by such use, is settled in *Allman v. Gann*, 29 Ala. 240.

Reversed and remanded.

RANDOLPH *vs.* BALDWIN.

[ACTION ON BILL OF EXCHANGE, BY ENDORSEE AGAINST DRAWER.]

1. *Constitutional provisions as to appointment and election of judges of inferior courts.*—The constitutional provision contained in the amendment adopted in 1850, which requires the general assembly to provide by law “for the election of judges of the courts of probate and other inferior courts, by the qualified electors of the counties, cities, or districts, for which such courts may be respectively established,” (Code, p. 49,) does not prevent the general assembly from establishing a county court, with common-law jurisdiction, and making the probate judge of the county, *ex officio*, the judge of such court.
2. *Ratification of judgments by ordinance of State convention.*—The ratification of judgments rendered during the war, by the ordinance of the State convention adopted on the 28th September, 1865, (Ordinance No. 26,) “relieves them from any objection which might be taken to them on the ground that, at the time of their rendition, the State was in a position of open hostility and war with the Federal government.”

APPEAL from the County Court of Montgomery.

Tried before the HON. DAVID CAMPBELL.

THE action in this case was commenced on the 8th February, 1862, and was founded on a bill of exchange, which was drawn by the defendant, payable to his own order, and by him endorsed to the plaintiff. Judgment by default was rendered on the 1st September, 1862; and that judgment is now assigned as error, on the ground that it was *coram non judice* and void. The cases of *Pollard v. Baldwin*, and *Scovel v. Jordan*, which were appeals from judgments of said county court of Montgomery, were argued and submitted at the same time; the judgment in the former case being rendered by default, on the 1st September, 1862; and the judgment in the latter case being rendered by *nil dicit*, on the 3d March, 1863. The county court of Montgomery, by which said judgments were rendered, was established by act of the general assembly, approved the 24th February, 1860.—Session Acts, 1859–60, p. 564. The first section of said act established the court, and declared it “an infe-

rior court of record in said county." By the second section it was provided, that "the judge of probate in said county shall be the judge of said county court;" and the third section conferred on said court jurisdiction, concurrent with that of the circuit court, of all civil actions involving less than ten thousand dollars.

ELMORE, KEYES & MORRISSETT, for appellants.—1. The constitution gives the general assembly power to establish inferior courts of record, but requires that the judges of such courts shall be elected by the people. The legislature may enlarge the jurisdiction of a court already established, or may require the judge of one court, constitutionally established, to discharge, in some special cases, the duties of the judge of another court constitutionally established; but it has no power to create a new court, and legislate a judge into it, in express violation of the constitution. If the legislature had the power to make the probate judge of the county, *virtute officii*, the judge of the county court, because he had been elected by the people, it might, with equal reason, have made the sheriff of the county the judge of such court. Suppose the probate judge had refused to sit as judge of the county court; could he have been compelled to do so, or been impeached and removed for his refusal? If not, the anomaly is presented of a constitutional court, in which there is a judge authorized to preside, in which no one else can preside, in which he refuses to preside, and in which he can not be compelled to preside, nor removed for his refusal to preside. The constitution requires that, when a new court is established, the judge thereof shall be elected by the people—not that he shall have been already elected by them to another office. The legislature can not do indirectly that which it is forbidden to do directly.

The case of *Gaines v. Harvin*, 19 Ala. 491, has no application to this case. The question in that case was, whether a register in chancery could be authorized by the legislature to appoint trustees. It was argued, that such appointment was a judicial act; and that the statute conferring such

power on the register, who was not elected, commissioned, and qualified as a judge, was unconstitutional.

2. The acts of the probate judge, sitting as judge of the county court, can not be sustained on the ground that he was an officer *de facto*. He did not hold the office "by color of election," or by "colorable authority," but notoriously without color of title, as every one was charged with knowledge of the constitution and statutes.—*People v. Collins*, 7 Johns. 550; 6 East, 368; Cro. Jac. 552; 3 Burr. 1452; 16 Viner's Abr. 113; *Rex v. Lisle*, Andrews, 163; 11 Serg. & R. 412; 6 How. Miss. 326; *Thompson v. The State*, 21 Ala. 42.

3. At the time the judgments were rendered, the State was in a position of open hostility and war with the Federal government; and the judgments are, therefore, null and void.—*Sheffield v. Lord Castleton*, 2 Vern. 393.

4. If the judgments are nullities, being the acts of a mere usurper, they are not covered by the ratifying ordinance of the convention of 1865. But, if they are held to be within the provisions of that ordinance, then it is submitted that the ordinance itself is a nullity, being the act of an illegal body. The convention of 1865, as the court must judicially know, was not called or held under the authority of the State, nor by authority of congress, but solely by and under the authority of the president of the United States. If the State was then out of the Union, and held by subjugation, congress only could authorize the organization of a government within it; and if it was not out of the Union, a convention could only be held under authority emanating from its regular government. The court judicially knows that the convention was not sanctioned by the political department of the general government, and was called in direct conflict with the decision of the supreme court of the United States in *Luther v. Borden*, 7 How. 1.

5. If the judgments are nullities, there should be a reversal, on the authority of *Cullum v. Casey*, (1 Ala. 357,) and *Peter v. The State*, (6 How. Miss. 326,) but the causes should not be remanded. But, whether there should be such reversal, or whether the appeals should be dismissed, on that ground, is submitted to the decision of the court.

MARTIN & SAYRE, and WATTS & TROY, *contra*.—1. The legislature has power, under the constitution, to establish new courts, and to enlarge, restrict, or otherwise change the jurisdiction of existing courts. Prior to the separate organization of the probate courts, the old county courts had jurisdiction of all orphans' business, and also common-law jurisdiction; and no objection was ever raised to them on constitutional grounds. The act creating the county court of Montgomery, and making the probate judge, *ex officio*, the judge thereof, in effect restored the old system in Montgomery county. There is no incompatibility in the same person holding two judicial offices.—16 Viner's Abr. 132. The court was constitutionally established, and the judge was constitutionally elected.—*Wales v. Belcher*, 3 Pick, 508; *State v. Collins*, 19 Ark. 587; *Brien v. Commonwealth*, 5 Metcalf, 508; *State v. Chase*, 5 Har. & G. 304; 8 Gray, 1; 14 Cal. 12; 10 Iredell, 377; 4 Serg. & R. 275. Moreover, the court judicially knows that the probate judge was elected by the people in May, 1862; which was two years after the establishment of the county court, and before the rendition of these judgments.—17 Ala. 229; 20 Ala. 33; 26 Ala. 461; 27 Ala. 17; 28 Ala. 164.

2. The judge of the county court was certainly an officer *de facto*, if not *de jure*, and his acts are binding on third persons.—*Burke v. Elliott*, 4 Iredell, 362; *Burton v. Patton*, 2 Jones, (N. C.) 128; *Commissioners v. McDaniel*, 7 Jones, (N. C.) 113; *Wilcox v. Smith*, 5 Wendell, 231; *Heath v. The State*, 36 Ala. 273.

3. If the judgments are void, the appeals should be dismissed.

BYRD, J.—The only question involved in these cases is, whether a judgment rendered by the county court of Montgomery county, in 1862, is valid. The counsel for appellants contend, that the judge of that court was not elected by the people to fill the office created by the act of the 24th February, 1860, and that therefore the judgments rendered by him are void, and reversible on appeal.—Pamph. Acts, 564. To sustain this position, they insist, that the amendment to the constitution adopted in 1850 makes it the duty

of the general assembly to provide "by law for the election of judges of the circuit courts by the qualified electors of their circuits respectively, and for the elections of judges of the courts of probate, and other inferior courts, by the qualified electors of the counties, cities, or districts, for which such courts may be respectively established"; and that, therefore, so much of the act as provides that "the judge of probate in said county shall be the judge of said county court within said county," is unconstitutional, and the acts of the judge in that court are void. On the other hand, it is argued, that the judge of probate having been elected by the people of the county, after the passage of the act, and before the rendition of the judgments, his acts are valid.

No one questions the power of the general assembly to establish by law inferior courts, with common-law jurisdiction, within a county, city, or district; and should it do so, we see no good reason why the legislature can not authorize any judicial officer, who has been elected by the people, to preside in such inferior court, if such officer has been elected by the people under the jurisdiction of the court thus established. In the case of *Harvin v. Gaines*, (19 Ala. 498,) this court said: "To hold all such acts as are performed by inferior officers void, because such officers have not been commissioned or qualified as the constitution requires judges to be elected and qualified, would be to unsettle the titles of the country, and to introduce a scene of confusion which would greatly disturb the public repose." This announces a doctrine stronger than is required to sustain the validity of these judgments.

But, if it were doubtful whether the general assembly had the power to designate such an officer as above indicated to preside in such inferior court, it would be our duty to sustain the exercise of such a power. And these judgments having been ratified and confirmed by the convention of 1865, (Ordinance No. 26,) relieves them, in our opinion, from any objection which might be taken to them on the ground that, at the time of their rendition, the State was in a position of open hostility and war with the Federal government.

Judgments affirmed.

DAUGHDRILL *vs.* SWEENEY.PRICE *vs.* SWEENEY.FRICKE AND WIFE *vs.* SWEENEY.

[BILLS IN EQUITY FOR REDEMPTION, CANCELLATION OF MORTGAGE, &c.)

1. *Tender*.—A mortgagor, asking a redemption, cancellation of the mortgage, &c., on the ground of a tender made and refused, must pay into court, at the time of filing his bill, the amount of money admitted to be due, and make an appropriate averment in his bill as to such payment; otherwise, his bill is without equity.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. N. W. COCKE.

ON the 20th October, 1865, James H. Daughdrill filed his bill in equity against John Sweeney, asking the cancellation of a mortgage, and of the promissory note which it was given to secure, an injunction of a sale under the mortgage, a redemption of the mortgaged premises, an account, and general relief. The mortgage, which was made an exhibit to the bill, and which was dated the 2d May, 1860, was given to secure the payment of a promissory note for three thousand dollars, executed by said Daughdrill, dated the same day with the mortgage, payable twelve months after date, to said Sweeney or order, negotiable and payable at the Bank of Mobile; conveyed several city lots in Mobile, and contained a power of sale by the mortgagee on default being made in the payment of the note at maturity. The bill contained the following allegations, as to the tender by the complainant of the amount due on the mortgage debt, and its refusal by the defendant: "After the maturity of said note, to-wit, on the 19th October, 1865, your orator tendered and offered to pay to the said defendant the full amount of the said promissory note, with the interest due thereon, in United States treasury-notes,

issued under authority of an act of congress ; by the terms whereof, the same were made lawful money, and a legal tender for all debts, public and private, within the United States, except import duties, and some other national dues ; said notes being of the kind and description commonly called 'legal-tender notes ;' and thereupon your orator requested and demanded of said defendant, on his part, to give up said promissory note, and to cancel said mortgage. But said defendant refused, and still refuses, to receive the amount due on the said promissory note, with the interest thereon, so tendered to him by your orator as aforesaid ; and refused, and still refuses, to give up said promissory note, and to cancel said mortgage ; and is now proceeding to advertise said premises for sale under said mortgage," &c. In the prayer of the bill, the complainant renewed his offer to pay, in these words : "And that upon full payment by your orator of the amount of the said promissory note, with the interest due thereon, in such current treasury-notes of the United States as are declared by law to be lawful money and a legal tender ; which payment your orator now offers to make to the said defendant," &c.

On the 6th November, 1865, Caleb Price filed his bill in equity against said John Sweeney, together with Augustus Brooks and Charles T. Ketchum, the two latter as partners doing business under the firm name of Brooks & Ketchum ; asking an injunction of a sale under a mortgage, and general relief. The mortgage was made an exhibit to the bill, and was dated the 19th November, 1859. It purported to be given to secure the payment of a promissory note for five thousand dollars, which was executed by said Price, of even date with the mortgage, payable to the order of said Sweeney, twelve months after date, negotiable and payable at the Bank of Mobile ; conveyed several city lots in Mobile, and contained a power of sale by the mortgagee on default being made in the payment of the note at maturity. The bill alleged, that the mortgagee advertised the mortgaged premises for sale on the 4th November, 1865, the note not having been paid ; that the complainant afterwards, on specified days, made ineffectual efforts to find said Sweeney, for the purpose of tendering to him, in treasury-notes of

the United States, commonly called "legal-tender notes," the amount due on the mortgage debt; that Sweeney avoided him, and kept out of his way, for the purpose of preventing such tender; that the complainant then tendered to said Brooks & Ketchum, who, as auctioneers and agents for said Sweeney, had advertised the premises for sale under the mortgage, "the full amount of principal and interest due on said note, together with a sufficient sum to cover all costs, expenses of advertising, &c.;" that this tender was made in treasury-notes of the United States, commonly called "legal-tender notes," and was refused by said Brooks & Ketchum, "who demanded gold, or its equivalent in currency"; and that the complainant "now proposes to bring into this honorable court, when directed by the court so to do, said sum of money."

On the 20th October, 1865, Charles Fricke, and Gertrude, his wife, filed their bill in equity against said John Sweeney; praying an injunction of a sale under a mortgage, a redemption of the mortgaged premises, a cancellation of the mortgage, and of the note which it was given to secure, and general relief. The mortgage was not made an exhibit to the bill, though reference was made to it for a description of the premises conveyed. According to the allegations of the bill, the mortgage was dated the 1st February, 1860; was given to secure the payment of a promissory note for three thousand dollars, of even date with said mortgage, signed by said Charles Fricke, and payable twelve months after date, to said Sweeney or order, at the Bank of Mobile; conveyed several city lots in Mobile, and contained a power of sale on default being made in the payment of the note at maturity. The allegations of the bill as to a tender were in these words: "During the war that has just closed, said Sweeney was unwilling to receive Confederate treasury-notes, and quietly waited, making no effort to sell said premises; but, within a short time, has become pressing for his money. On yesterday, the 19th October, 1865, your orator Charles Fricke tendered to him, in money which was genuine, and which was a good and lawful tender according to law, the whole amount of principal and interest due on said note, and re-

quested him to accept the same, and to deliver up said mortgage and note; but said Sweeney refused to accept said money, and refused to surrender up said note and mortgage, and is about proceeding to sell said premises, notwithstanding your orators are willing to pay said mortgage, and to redeem said property, which they are willing to do, and now offer to do the same."

After the filing of the answers, the chancellor dissolved the injunction in each case, for want of equity in the bills; and his decrees were here assigned as error.

ANDERSON & BOYLES, for the appellants.—The act of congress approved March 3, 1863, which makes treasury-notes, issued under its provisions, lawful money and a legal tender, is not obnoxious to objection on constitutional grounds, and is applicable to contracts made prior to its passage. Both these points have been expressly decided, in several recent cases, in New York, Iowa, and Pennsylvania, some of which are not yet officially reported.—*Metropolitan Bank v. Vandyck*, 27 N. Y. 400; *Meyer v. Rosevelt*, *ib.*; *Wambold v. Schiltching*, 16 Iowa, 243. In the case of *Thompson v. Riggs*, as reported in the newspapers, the same decision has been made by the supreme court of the United States. The validity of the act may be maintained on the principles established by the cases of *McCullough v. Maryland*, 4 Wheaton, 406; and *Osborn v. United States Bank*, 9 Wheaton, 738.

THOS. H. HERNDON, *contra*.—1. Admitting the constitutionality of the act of congress, in deference to the repeated adjudications of the courts of the country, it is insisted that said act applies only to debts created before its passage. A retroactive effect, which is necessarily unjust, will never be given to a statute, even when it does not impair the obligation of contracts, unless such construction is required by the express words of the statute.—*Dash v. Van-kleeck*, 7 Johns. 477-509; 1 Kent's Com. 508; 19 Vermont, 90; 21 Conn. 355; 19 Ala. 709.

2. The bills ought to have stated the amount of money tendered, so that the court might see that it was sufficient ; and the money ought to have been paid into court when the bills were filed.—*Taylor v. Reed*, 5 Monroe, 36 ; *Spoor v. Phillips*, 27 Ala. 193 ; 11 Iowa, 30 ; 30 Vermont, 577 ; 1 Car. & P. 288 ; 3 Car. & P. 342 ; 34 Ala. 126 ; 2 Spence's Equity, 653, 675.

JUDGE, J.—These cases being of the same character, and inasmuch as the decision of one question involved will be decisive of them all, they will be considered together.

Equity, in many cases, adopts and follows the analogies furnished by the rules of law. By a statute of this State, "a plea of tender of money, or of a thing in action, must be accompanied by a delivery of the money, or such thing in action, to the clerk of the court."—Code, § 2245. The analogy of such a plea, to each of the bills in these cases, is sufficiently striking to authorize it to be followed. In *Taylor v. Reed*, (5 Monroe, 36,) it was held, that if a party "pretends to avail himself of the plea of tender in equity, because he could not make it at law, he ought to be held to as great strictness as he would be held to at law."—See, also, *Spoor v. Phillips*, 27 Ala. 193.

If a legal tender was made, of the money acknowledged by the complainant in each case to be due, it should have been followed up by a payment of the money into court, at the time of filing their respective bills ; and a compliance with this requisition should be shown by an appropriate averment in each bill. Such an averment not having been made, the bill in each case is without equity.

We waive all consideration of the question as to the validity of a tender, made in the treasury-notes declared by act of congress "lawful money and a legal tender in payment of all debts," &c., because it is not necessary to a decision of the cases before us. We are informed, however, that the supreme court of the United States has recently decided this question in the affirmative ; but we have not had access to the opinion. We waive, also, all consideration of the other questions presented in each case, con-

nected with the alleged tender, some of which have been so ably argued by counsel for the appellees.

The decree of the chancellor in each case, dissolving the injunction, is affirmed, with costs.

MAY vs. LEWIS.

[APPLICATION BY SHERIFF FOR INSTRUCTIONS AS TO APPROPRIATION OF MONEY UNDER FL. FAS.]

1. *Construction of bill of exceptions.*—A recital in the bill of exceptions, that, "under the facts stated within, the court held and ordered," &c., is not sufficient to show that all the evidence in the case is set out in the record; and this, although it appears that the facts were agreed on by consent. (JUDGE, J., *dissenting.*)
2. *Presumption in favor of judgment.*—On an application by the sheriff, for instructions as to the appropriation of money under sundry executions in his hands, the appellate court can not revise the ruling and decision of the primary court, unless all the evidence is set out in the record.

APPEAL from the Circuit Court of Tuscaloosa.

Tried before the Hon. JOHN HENDERSON.

THE appellee in this case, who was the sheriff of Tuscaloosa county, made application to said circuit court, at its October term, 1866, by motion, for instructions as to the appropriation of money under sundry executions in his hands against John W. Prewitt. The executions were thus described in the motion: "One in favor of W. Moody, No. 9,583, on judgment of September 24, 1861, for \$458.96, and costs; one in favor of W. K. Hargrove, No. 9,477, on judgment of September 24, 1861, for \$3,341.65, and costs; one in favor of May, adm'r, No. 9,596, on judgment of September 24, 1861, for \$4,533.23, and costs; one in favor of W. Moody, No. 9,593, on judgment of September 24, 1861, for \$3,575.46, and costs; and one in favor of W. Moody, No. 9,703, on judgment of 24th March, 1862, for \$953.56, and

costs." On the trial, or hearing of the motion, at the same term, the following bill of exceptions was reserved by said May and Moody:

"In the circuit court of Tuskaloosa. Fall term, 1866.

"Application to the court, by Thomas P. Lewis, sheriff, to be instructed how to dispose of five hundred and seventy-three dollars, collected by him, on 31st August, 1866, by the sale of certain personal property of John W. Prewitt, under the executions mentioned in the motion. It is agreed by the parties interested, that the facts are rightly stated in the application, as far as they go, and that the other facts are as follows: Executions were issued on said Hargrove's judgment, on the 16th October, 1861, the 2d May, 1862, the 30th September, 1862, the 25th October, 1863, the 13th September, 1865, and the 28th April, 1866. These successive executions went at once, (say the day on which they were issued,) into the hands of the sheriff; and said execution last mentioned was levied on said property on the 4th May, 1866, and said property was, soon afterwards, advertised for sale under said execution alone. Executions were issued on Moody's judgment, No. 9,583, on the 16th October, 1861, the 2d May, 1862, the 4th December, 1862, the 9th March, 1864, the 9th September, 1865, the 23d February, 1866, and the 2d July, 1866; and these successive executions went into the hands of the sheriff at once, (say the day on which they were issued,) except the last, which went into his hands on the 2d August, 1866. Executions were issued on said Moody's judgment, No. 9,593, and placed in the hands of the sheriff, as in case of No. 9,583. Executions were issued on said Moody's judgment, No. 9,703, on the 10th September, 1862, the 4th December, 1862, the 7th March, 1864, the 9th September, 1865, the 26th February, 1866, and the 3d July, 1866; and these successive executions were placed in the hands of the sheriff at once, (say the day on which they were issued,) except the last, which was placed in his hands on the 3d August, 1866. Executions were issued on said May's judgment, on the 16th October, 1861, the 2d May, 1862, the 30th September, 1862, the 7th March, 1864, the 9th September, 1865, the 23d February, 1866, and the 2d July, 1866; and these suc-

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cessive executions were placed in the hands of the sheriff at once, (say the day on which they were issued,) except the last, which was placed in his hands on the 2d August, 1866. No levy was endorsed on, or attached to any of these executions, except Hargrove's, until after the 3d August, 1866; and the levies were written on four separate half-sheets of paper, and were to be attached to each of the other executions. The execution last issued in each case, was in the hands of the sheriff when the property was sold; but the separate sheets had not been attached to the executions on the day of the sale. The affidavit of A. C. Hargrove, which is hereunto attached as an exhibit, was read in evidence on this motion." (Said affidavit states, that the deponent saw said executions in favor of May and Moody, on the day of the sheriff's sale, and that no levy was then endorsed on them.) "Under the facts stated within, the court held and ordered, that all the money in the hands of the sheriff be appropriated to the execution in favor of said Hargrove; to which ruling said May and said Moody excepted."

The ruling of the circuit court on the motion of the sheriff is the only matter assigned as error.

W. MOODY, for appellants.

HARGROVE & FITTS, *contra*.

BYRD, J.—The bill of exceptions recites, that, "under the facts stated within, the court held and ordered, that all the money be appropriated to the execution in favor of Hargrove"; to which the appellants excepted. This bill is defective, in not showing, affirmatively, that all the evidence introduced on the hearing of the motion is set out; a defect of very frequent occurrence. This court has often held, that it will not revise the decision of the court below, upon the evidence, unless the record shows that it is all set out in the bill of exceptions.

The assertion that, "under the *facts* stated within," taking the word "facts" in the acceptance of the term *evidence*, is not equivalent to the expression "that all the evidence is stated within." In the case of *Raines' Adm'r v. Raines'*

Creditors, (30 Ala. 426,) this court held the phrase, "upon this testimony, the plaintiff asked the court for a decree in his favor," was not sufficient, and said: "In such case, we can not presume there was no other evidence before the court." In the case of *The Southern Mar. Ins. Co. v. Holcombe*, (35 Ala. 327,) the court held, that the word "*thereupon*," coming immediately after the evidence set out in the bill of exceptions, was not sufficient to authorize this court to presume that all the evidence was set out in the bill. In the case of *Fickling v. Brewer*, (38 Ala. 685,) neither the report of the case, nor the opinion of the court, shows what was the expression used in the bill of exceptions; but, by reference to the record on file, it appears that it is, "on this proof," which immediately followed the evidence set out; and this was held insufficient as an averment that all the evidence was set out. In the case of *Henley v. Lee*, at the last term, this court held, that the assertion, "*on this state of proof*," was insufficient. The case of *The Southern Marine Ins. Co. v. Holcombe*, *supra*, was cited, and, to that extent, re-affirmed as authority, in the case of *Ward v. Cameron's Adm'rs*, 37 Ala. 691. The case of *Bradley v. Andress*, 30 Ala. 80, is a case strikingly in point, on the presumptions indulged by this court in favor of the action of the courts of inferior jurisdiction. And in the case of *Taylor v. McElrath*, (35 Ala. 332,) the chief-justice lays down, with much exactness of statement, the doctrine on this question.—See, also; *Cotten v. Bradley*, 38 Ala. 506; *Kirksey v. Hardaway*, *Briggs v. Cribbs*, and *Hays, ex'r, v. Cockrell*, decided at this term; *Guilford v. Hicks*, 36 Ala. 95.

Upon the reasoning and authority of the decisions referred to, the ruling of the court below must be affirmed.

JUDGE, J., *dissenting*.

STALWORTH *vs.* BLUM.

[BILL IN EQUITY FOR REDEMPTION, CANCELLATION OF MORTGAGE, &c.]

1. *Construction of stipulation in mortgage, as to terms of payment.*—A provision in a mortgage, reserving to the mortgagor “the right to pay all, or any part of said indebtedness, at any time during the present year (1863), in current paper funds,” does not restrict him to a single payment of the entire amount due, but authorizes partial payments at different times during the year; and such payments might be made, under that stipulation, in treasury-notes of the Confederate States, notwithstanding their great depreciation.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. N. W. COCKE.

THE bill in this case was filed, on the 2d April, 1864, by Mrs. Theresa Blum, suing by her next friend, against Thomas B. Stalworth; and sought the cancellation of a mortgage, a redemption of the mortgaged premises, an account, and general relief. The mortgage, which was made an exhibit to the bill, was dated the 13th March, 1863, and contained the following stipulations: “In trust and confidence, however, and upon the following condition—that whereas I am indebted to the said Stalworth, in the sum of three thousand dollars, and interest, according to the tenor and effect of three promissory notes made by me in his favor, all bearing even date herewith, negotiable and payable in gold or silver coin, with interest from date, at the Bank of Mobile; one due one year after date, and one due two years after date, and one due three years after date: Now, if I, the said Theresa, shall well and truly pay said notes at maturity, according to the tenor and effect thereof, then, and in that case, this conveyance to be void; this instrument being intended as a mortgage to secure said debt only. And it is further understood and agreed, by these presents, that I, the said Theresa, *retains* and *has* the right, as by agreement with said Stalworth, to pay all, or

any part of said indebtedness, at any time during the present year, in current paper funds, and thereby stop the interest; and in case all of said debt is so paid during this year, then this instrument to be void; it being further understood herein, that all payments made after this year is to be in gold and silver, according to the tenor and effect of said notes." The bill alleged, that the complainant paid two of the secured notes, on the 20th July, 1863, in Confederate States treasury-notes; that the payment was accepted by Stalworth, and the two notes were delivered up; that in the latter part of December, 1863, the complainant made several ineffectual efforts to find said Stalworth, for the purpose of tendering to him the amount due on the last note, and did not succeed in seeing him until the 31st; that she then tendered to him, in treasury-notes of the Confederate States, which were at that time current, the full amount due on said note, and demanded the surrender of said note, and the cancellation of said mortgage; that the defendant refused to accept the money, or to deliver up the note, and insisted on payment in gold or silver; and that the complainant was "ready to pay said money, principal and interest, into court, or to abide such other order as the court may make in the premises."

The defendant answered the bill, denying that a sufficient tender was made on the 31st December, and insisting on his right to demand payment in gold or silver.

On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, and ordered an account to be taken by the master, to ascertain the specie value of Confederate States treasury-notes on the 31st December, 1863. The master reported the amount due on the last note, on the 31st December, 1863, to be fifty-nine 12-100 dollars in specie; and his report was confirmed, without exception by either party. The chancellor then rendered a final decree, requiring the complainant to pay into court, within thirty days, the amount reported to be due on the last note, with interest thereon; and requiring the defendant, on being notified of such payment by the register, to deliver up the mortgage and note for cancella-

tion, and to enter satisfaction of the mortgage on the record. The chancellor's decree is now assigned as error.

E. S. DARGAN, for appellant.

A. J. WALKER, C. J.—The learned counsel for the appellant assails the correctness of the decree of the court below, upon the two following grounds: 1st, that the agreement between the parties did not secure to the appellee the right to pay all the notes, at different times during the year 1863, in current paper funds; and, 2d, that paper so much below par as that which the appellee tendered, could not properly be said to be "current." The first ground taken in argument is sufficiently answered by the language of the agreement itself. It secures a right "to pay all, or any part of said indebtedness, at any time during the present year (1863), in current paper funds." We think it would be an entire perversion of this agreement, to hold that the privilege of payment was restricted to a single occasion, and was exhausted by a single act of payment. The adjective "current," when qualifying money, is not the synonym of "convertible." It is employed to describe money which passes from hand to hand, from person to person, and circulates through the community, and is generally received. Money is current, which is received as money in the common business transactions, and is the common medium in barter and trade.—*Haynes v. Wheat & Fenwall*, 9 Ala. 239; *Aicardi v. Robbins*, in manuscript. We therefore decide, that the money tendered by the appellee was, under the evidence, current money.

We find no error in the decree of the court below, and it is therefore affirmed.

BOGIA *vs.* DARDEN AND WIFE.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Ex-parte statement of account against non-resident guardian.*—To sustain an *ex-parte* settlement of a guardian's accounts and vouchers, on the ground that he has removed from the State without making a settlement, (Code, § 2038,) the record must affirmatively show the fact of his removal, and a compliance with the requisitions of the statute as to the publication of notice against him. A recital in the order directing the publication of notice, that it appeared to the court, "from an inspection of the petition," that the guardian had removed from the State, is not sufficient proof of the fact of removal, when the petition is not under oath; and a recital in the final decree, that it appeared to the court, "from satisfactory proof, that said guardian has had notice, by publication and otherwise, and as directed in the former order of this court," is not sufficient proof of publication, when the former order does not specify the length of time the notice is to be published.

APPEAL from the Probate Court of Macon.

IN the matter of the final settlement of the accounts and vouchers of Peter Bogia, as guardian of Ellen Darden, formerly Ellen Holman, now the wife of Henry C. Darden. The ward's petition for the settlement, which was signed by her attorney, and was not under oath, alleged, that letters of guardianship were issued to said Bogia, by said probate court, on the 14th September, 1854; that he received on the 1st March, 1857, the sum of six hundred and forty-two dollars, belonging to his said ward; that he had never made any statement or settlement of his accounts that he had removed from Alabama, and that he resided in Florida. At a special term, held on the 6th September, 1867, the day on which the petition appears to have been filed, the following order was made:

"This day came Ellen Darden, formerly Ellen Holman, by her attorney, and moves the court to proceed and state the accounts of Peter Bogia, the guardian of said Ellen in this court. And it appearing to the court, from an inspec-

tion of the petition on which said motion is made, that said Bogia, guardian as aforesaid, has removed from the State, without having a settlement of his said guardianship; the court now proceeds to state said account against him, from materials in the office of the judge of this court, and from such other information as may be accessible to the court; charging him with such articles or moneys as may have come into his hands, and crediting him with all the credits to which he may be entitled, so far as known to the court. And the said account, now being so stated, shows that said Peter Bogia has had in his hands the sum of six hundred and forty-two dollars, and with which it appears that he is justly chargeable in his character as guardian, together with the legal interest on the same, he having made no settlement of his guardianship. It is therefore ordered, that the third Monday in October, 1867, be appointed a day on which to examine, audit, and re-state the account, if necessary, which is hereby ordered to be filed for inspection, exception, and objection. It is further ordered, that notice of the above proceeding be given, by publication in the *Tuskegee News*, a newspaper published in said county, in order that all persons in interest can appear, and contest the same, if they think proper; and that a copy of said published notice be forwarded, post-paid, and properly addressed, to said Bogia, in order that he may show cause, if any he has, why the court should not render a decree against him, in favor of Ellen Darden, (formerly Holman,) in accordance with the account so stated, or as the same may be re-stated on said day, or any other day to which the examining, auditing, and stating of the account may be regularly continued."

The next entry in the transcript, which is entitled in the margin "Copy of published notice," dated said 6th September, 1866, and signed by the probate judge, is as follows: "Peter Bogia, guardian of said Ellen Darden, (formerly Holman,) having removed from the State, and having wholly failed to file any account, or make any settlement of his said guardianship, the said court this day proceeded to state said account from the materials in the office of the judge thereof, and from such other information as has been

accessible to the court. It is therefore ordered by the court, that the third Monday in October be appointed a day on which said account can be examined, audited, and re-stated, if it be found necessary; at which time, all persons in interest can appear," &c. On the 18th October, the cause was continued, and again on the 12th November; and on the 19th December, 1866, the following decree was rendered: "This being the day regularly appointed by a former order of this court, made and entered on the 16th day of September, 1866, to examine the account heretofore stated by the court against Peter Bogia, the guardian of said Ellen Darden, (formerly Holman,) and to audit and re-state the same, if it should be necessary; now comes the said Darden, by her attorney, and moves the court for a decree upon said account, as the same, upon re-auditing, now stands stated; and it appearing to the court, from proof satisfactory to the court, that said Bogia has had notice, by publication and otherwise, and as directed in said former order of this court; and no objection, or exception, as to the said account, as heretofore stated by the court, having been filed, and none now being made known to the court,—it is ordered, adjudged, and decreed by the court, that Henry C. Darden, for the use of his wife, Ellen Darden, (formerly Holman,) do have and recover from said Peter Bogia the sum of one thousand and fifty-one 52-100 dollars, (that amount being now adjudged by the court to be due from Peter Bogia, as such guardian of said Ellen Darden, formerly Holman,) besides the costs of this proceeding; for which execution may issue."

The decree of the court is now assigned as error.

G. D. & G. W. HOOPER, for appellant.—The record should affirmatively show a compliance with all the requisitions of the statute as to the publication of notice, as in case of non-resident defendants in chancery, and that the guardian had in fact removed from the State.—*Wright v. Clough*, 17 Ala. 490; *Hartley v. Bloodgood*, 16 Ala. 238; *Butler v. Butler*, 11 Ala. 668; 3 Phil. Ev. 1002; 11 Wendell, 651; 31 Maine, 267; 11 Humph. 71; *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

W. C. McIVER, *contra*.—When a guardian removes from the State, without having made a final settlement of his accounts, no notice to him, by publication or otherwise, is required by the statute.—Code, § 2037; *Wright v. Clough*, 17 Ala. 490. The regularity of the proceedings is sustained by the case of *Croft v. Ferrell*, 21 Ala. 351.

BYRD, J.—When a guardian removes from the State, without making final settlement, the judge of probate is authorized to state an account in his absence, from the materials in the office, and such testimony as may be adduced.—Code, § 2038. In the settlement of the accounts of guardians, and in all the preparatory proceedings thereto, the law providing for the settlement of the accounts of executors and administrators, so far as applicable, is in full force against guardians and their sureties, if not in hostility to any provision of chapter 3d, title 5, part 2 of the Code.—Code, § 2039. If any executor, or administrator, fails to make settlement as required by section 1876 of the Code, the court may state the account against him, from the materials in the office, or such other information as may be accessible to the court, charging him with such articles as may have come to his hands.—Code, § 1878. After stating such account, and giving notice of the same by publication, as in case of other settlements, the court must proceed to examine the account, audit, and re-state the same, if necessary.—Code, § 1879. The court, after stating such account, must render a decree thereon, in favor of the remaining, or any succeeding executor or administrator; or, if the estate can be finally closed on such settlement, must render decrees as on a final settlement thereof.—Code, § 1881. Section 1880 provides for a contest of the account stated under the provisions of sections 1878 and 1879. Upon the filing of an account, vouchers, evidence, and statement for a final settlement, the judge of probate is required to appoint a day for such settlement, and must give notice of the same, by publication in some paper published in the county, if there is one so published, for three successive weeks.—Code, § 1805. Such notice must state the name of the executor, or administrator, the name of

the deceased, and the day appointed for settlement; and if the settlement is proposed to be final, it must be so stated.—Code, § 1806.

We have stated, substantially, so much of the Code as is necessary for the decision of the questions raised on the record and argued by counsel. It is insisted by counsel for appellant, that the court below erred in rendering a decree final, for the reasons, that the record does not show that appellant had removed from the State; and that, if it did, it does not show that publication was made as required by the foregoing provisions of the Code. This settlement would be held good on a collateral attack, under the decisions of this court; but can it be sustained upon a direct attack on appeal? The record does not disclose any evidence to show that the appellant had removed from the State, and the recitals in the several decrees do not refer to any. The only reference is to the petition of the ward, which is not verified by oath or affidavit. The order of publication does not require the notice to be published for any definite or indefinite period of time; nor does the decree or record show that the order of publication was published in a newspaper for a longer time than one insertion.

In the case of *Wright v. Clough*, (17 Ala. 490,) this court assimilates these proceedings, under a statute in its provisions similar to the above provisions of the Code, to like proceedings against a *non-resident* defendant to a bill in equity; and it would seem to follow that, where, on appeal, a decree *pro confesso* against a non-resident defendant to such a bill would not be held good, neither would a decree against a *non-resident* guardian, under the same or like circumstances, be held good. We think it clear, upon the authority of the following cases, decided by this court, that neither a decree *pro confesso* in chancery, nor a final decree in the probate court, on a record like this, would be held good on appeal: *Croft v. Terrell*, 15 Ala. 652; *Croft v. Ferrell*, 21 Ala. 355; *Hartley v. Bloodgood*, 16 Ala. 233; *Lyon v. Odom*, 31 Ala. 234; 28 Ala. 265; *Wyatt v. Rambo*, 29 Ala. 510; *Keifer and Wife v. Barney & Bro.*, 31 Ala. 192.

If the appellant had appeared in the court below, on the hearing, and made no objection to the preliminary proceed-

ings in that court, it would have been too late, perhaps, to have made them for the first time in this court. But, where a party seeks to sustain a decree against another, who had no personal notice of the proceeding, the record must affirmatively show, *upon appeal*, the existence of every material fact, prescribed by law, as a pre-requisite to the rendition of the decree; or it is reversible.

Neither the removal of the appellant from the State, nor the publication of the notice for the time, and as prescribed by law, sufficiently appears upon the record to have authorized the probate court to render the final decree in this cause.

It results, that the decree of the probate court must be reversed, and the cause remanded for further proceedings.

CHISOLM vs. CHISOLM'S EXECUTORS.

[APPLICATION BY WIDOW FOR ALLOTMENT OF HOMESTEAD,]

1. *Exemption of homestead for widow and family of insolvent decedent.*—By section 1738 of the Code, and the acts amendatory thereof, approved respectively on the 30th January, 1860, (Session Acts, 1859-60, p. 18,) and the 9th December, 1864, (Session Acts, 1864, p. 93,) a permanent homestead, or its value in money, is secured to the widow and family of a decedent whose estate is insolvent; and the fact that the widow's dower in the lands has been allotted to her, is no bar to her application for the benefit of the statute.

APPEAL from the Probate Court of Henry.

IN the matter of the petition of Mrs. E. C. Chisolm, the widow of Robert J. Chisolm, deceased, for an allotment of the homestead, "in accordance with section 1738 of the Code, and the laws amendatory thereof," belonging to the estate of her said deceased husband. The petition was filed on the 27th November, 1866, and alleged, that the pe-

tion and Walter Chisolm, her minor child, were the only heirs-at-law of said decedent; that the deceased was seized and possessed, at the time of his death, of certain lands in said county, which were particularly described in the petition; that the estate had been reported and declared insolvent, and that it was necessary to sell the real estate for the payment of debts. The prayer of the petition was, that appraisers might be appointed "to set apart five hundred dollars worth of said lands to her and said minor child"; or, if the appraisers should report that this could not be done, "that the court will order John M. Bowden and E. C. Chisolm, the executor and executrix of said estate, to sell said real estate, and to pay to the widow and said child five hundred dollars of the proceeds of sale." The court appointed the 14th January, 1867, for the hearing of the petition; and, on that day, rendered the following decree: "Upon this, it being the day set to hear and determine an application by E. C. Chisolm," &c., (stating the averments and prayer of the petition,) "came the said petitioner, and moves the court to grant her said application; and J. M. Bowden, her co-executor of said estate, being present, but making no objection; thereupon, the court proceeded to hear and determine the same; and it was shown, to the satisfaction of the court, that all the allegations contained in said petition are true; but, it further appearing that said widow has heretofore claimed, and had duly allotted to her, dower in said lands, it is ordered, that said petition be dismissed; the court holding, that she is not entitled to both dower and five hundred dollars worth of that real estate." The decree of the court is now assigned as error.

W. C. OATES, for the appellant.

JUDGE, J.—An act of the legislature, passed December 9, 1864, provides, "that the act approved January 30, 1860, entitled 'An act to construe section 1738 of the Code,' shall be held and construed to apply to real estate, only in cases where the estate of the decedent is insolvent, and it becomes necessary to sell the real estate for the payment of

debts." The act of 1864 provides further, "that in cases where the widow, or widow and children, are entitled to five hundred dollars worth of land, under said section, the judge of the probate court may appoint three appraisers, who shall, after being duly sworn, proceed to lay off and set apart said land in accordance with said section, and make due return thereof, in a reasonable time, to said court; and if the real estate can not be divided, so as to set apart five hundred dollars worth thereof, under said section, and the commissioners shall so report, the probate court shall order, that the executor, or administrator of the estate, shall sell the real estate, and pay to the widow, or widow and children, or child, or children, five hundred dollars of the proceeds of sale."—Session Acts, 1864, p. 93.

The benefits intended to be conferred upon the widow of a decedent, by the legislation above cited, are not limited, as was supposed by the court below, to cases in which the widow may assert no claim to dower in the realty of the estate. Irrespective of the widow's dower, it was intended, in the event the estate should be insolvent, and a sale of the real estate become necessary for the payment of debts, to secure to the *family* of the deceased—"the widow, or widow and children, or child, or children"—a permanent homestead of the value of five hundred dollars, if such could be set apart to them from the realty; and if it could not, to secure its equivalent in money, to be realized from a sale of the realty, for their use and benefit.

It results that the court below took a wrong view of the question involved, and that the decree must be reversed, and the cause remanded.

KIRKSEY *vs.* HARDAWAY.

[MOTION BY SHERIFF FOR INSTRUCTIONS AS TO APPLICATION OF MONEY UNDER EXECUTIONS.]

1. *Assignment of error by party not appealing.*—On appeal from a judgment of the circuit court, instructing the sheriff how to apply certain moneys in his hands on sundry executions, an assignment of error by one of the plaintiffs in execution, who took no appeal, though he reserved a bill of exceptions, will be treated as a nullity by the court, when it is not made with the consent of all the parties in adverse interest, and there is no joinder in error by them as to such assignment.
2. *Construction of bill of exceptions.*—A recital in the bill of exceptions, that, “upon the foregoing evidence, the court decided,” &c., is not equivalent to an averment that all the evidence is set out. (JUDGE, J., *dissenting.*)

APPEAL from the Circuit Court of Greene.

Tried before the Hon. JAMES COBBS.

THIS was a motion by William R. Hardaway, the sheriff of said county, for instructions how to apply certain moneys in his hands, arising from the sale of property belonging to Abram F. Alexander, deceased, and Ephraim J. Butler, under sundry executions. The several plaintiffs in execution, being notified of the motion, came into court, and contested with each other their respective rights to the money. There were in the sheriff's hands, at the time of the sale of Alexander's property, six executions, issued on judgments rendered by said circuit court, in favor of W. P. Webb, Benjamin T. Higginbotham, Joseph W. Hall, William M. Hale, James B. Clark, and Mary J. Lipscomb, respectively; and four executions from the probate court, in favor of Foster M. Kirksey, as the guardian of Ellen G. Bullock, William A. Bullock, Frances B. Bullock, and Laura L. Bullock, respectively. The executions in favor of Kirksey were founded on decrees rendered by said probate court, on the 6th April, 1861, in favor of his said wards respectively, against James R. Evans, the predecessor of said Kirksey

as guardian ; and executions on these decrees having been issued against said Evans, and returned "No property found," executions were then issued against him and the sureties on his official bond as such guardian, of whom said Alexander was one ; and these executions were regularly kept up, until the sale, which was made in October, 1866. All these executions, together with the said decrees of the probate court, and the official bonds of said Evans as guardian, were offered in evidence on behalf of said Kirksey. The several executions from the circuit court were issued on judgments rendered by said court at its April term, 1863, and were regularly kept up ; and all these executions were offered in evidence on the part of the several plaintiffs therein. The bill of exceptions, after stating all the facts connected with the issue, levy, and return of these several executions, (which, however, it is unnecessary to state here,) proceeds thus : "All the foregoing execution creditors, being notified by the said sheriff, came into court, by their attorneys, and contested their rights to the money brought into court. Thereupon, upon the evidence aforesaid, the court decided, that said money should be applied to the said executions from the circuit court, to the exclusion of said executions from the probate court ; to which decision said F. M. Kirksey excepted."

The money in the hands of the sheriff, arising from the sale of property belonging to Ephraim J. Butler, was claimed by said Kirksey, under the same executions ; said Butler having been surety of said James R. Evans, on his official bond as guardian ; and it was also claimed by A. R. Davis and others, under executions issued on judgments of the circuit court, which need not to be particularly described. The bill of exceptions, after describing these several executions, proceeds thus : "The said execution creditors, having been notified, appeared in court, and contested their rights to said sum of money ; and the court decided, upon the foregoing evidence, that the said execution of A. R. Davis should be first paid in full, and that the residue should be applied to said other executions from the circuit court, to the exclusion of said probate executions ; to which decision said Kirksey excepted."

There is another bill of exceptions in the record, which was reserved by Duncan Dew, as the administrator of Duncan Dew, deceased, to the refusal of the court to direct the appropriation of the money in the hands of the sheriff, arising from the sale of said Alexander's property, to the satisfaction of an execution in his favor; but the decision of this court renders it unnecessary to state any of the facts connected with his claim.

The appeal was sued out by Kirksey, who assigned as error the rulings of the court to which he reserved exceptions; and Dew also assigned as error, on the same record, the ruling of the court to which he excepted. The record does not show that any appeal was sued out by said Dew; but there is an agreement of record, copied into the transcript at the bottom of his bill of exceptions, and signed by Kirksey's attorneys, and by "Webb, and Morgan & Jolley, attorneys, &c.," in these words: "We agree to waive citation, and notice of appeal, and consent that an appeal be taken without bond, except security for costs of appeal; and that it may be heard and decided upon the appeal taken by the said F. M. Kirksey on this record." There is another agreement of record, which is copied into the transcript at the bottom of Kirksey's bill of exceptions, and which is in the same words as the above, with the exception of the italicized portion; and to this agreement are signed the names of Kirksey's attorneys, Dew's attorney, and "W. P. Webb, and Morgan & Jolley, attorneys for circuit-court execution creditors." There is also another agreement, at the foot of the brief submitted by Dew's attorney, in these words: "We agree that the court shall consider the question raised on Dew's bill of exceptions and assignment of errors, upon the record in this case, on the giving security for the costs of appeal; and, if necessary, to enter on the record that we deny the truth of the errors assigned, or what may be called the *similiter*. We agree that the clerk make the assignment, or joinder, in our names, that there is no error." The names signed to this agreement are: "J. B. Clark, for appellant"; "Morgan & Jolley, attorneys for B. F. Higginbotham"; "W. Coleman, for appellant"; "W. P. Webb, for sheriff."

J. B. CLARK, and T. REAVIS, for appellant Kirksey.

JAMES B. CLARK, and S. W. COCKRELL, for appellant Dew.

W. P. WEBB, and MORGAN & JOLLEY, for the appellees.

BYRD, J.—1. The administrator of Dew not having taken an appeal, and the errors assigned by his counsel not having been assigned by consent of all the adverse parties, and there being no joinder in such assignments, they will be treated as a nullity, and will not be considered by this court.

2. The bill of exceptions does not purport to set out all the evidence introduced on the hearing of the motion, but states that, "upon the foregoing evidence, said court decided," &c. This expression is equivalent to the word "*thereupon*," used in the case of *The Southern Marine Ins. Co. v. Holcombe*, (35 Ala. 327,) and the expression, "upon this state of proof," used in the case of *Hendley v. Lee*, decided at the January term, 1867. In the case from 35 Ala., the word "*thereupon*" evidently referred to the foregoing evidence set out in the bill of exceptions in that case; and in the case of *Hendley v. Lee*, the words, "upon this state of proof," as evidently referred to the evidence set out in the record; yet both were held to be insufficient, as an assertion affirmative of the proposition, that all the evidence was set out in the bill of exceptions. It is a stringest rule; but it has been so long established, that we do not feel at liberty to depart from it. That the court decided a question upon the evidence stated in the bill of exceptions, is not an affirmation that the evidence set out therein was all that was introduced; nor does it bind us to pass upon the same facts, in the absence of an averment in the bill that the evidence set out was all that was introduced. The court may have decided erroneously, upon the facts stated, and yet have decided right, if all the facts had been contained in the bill, which were in proof on the hearing. We conceive that the principles settled in the following adjudications, are applicable to this case, and are conclusive: *Keep v. Kelly & Levin*, 29 Ala. 322; *Bradley v. Andress*, 30 Ala. 80; *Lovett v. Chisholm*, 30 Ala. 88, and authorities therein

cited; *Southern Marine Insurance Co. v. Holcombe*, 35 Ala. 327; *Henley v. Lee*, decided at the January term, 1867.

A bill of exceptions is construed most strongly against the party excepting, and he is bound to show error affirmatively, else the decision of the court below must be affirmed. *Boe, ex dem., v. Godwin*, 30 Ala. 242.

Let a judgment of affirmance be entered.

JUDGE, J.—I concede it to be a salutary rule of construction, that a bill of exceptions must be construed most strongly against the party excepting. But, in the enforcement of this rule, the construction, in all cases, should be a reasonable one. When the action of the court is stated to be, “*upon the foregoing evidence*,” I think a fair and reasonable construction authorizes the conclusion, that it was upon the evidence stated, and that alone, that the court acted; and it is not, in my opinion, a fair or reasonable construction in such case, to *presume* that the action of the court was predicated, not only upon the evidence stated, but also upon other evidence not stated. I concede that the previous decisions of this court have gone a long way towards sustaining, if they do not justify, the ruling of the majority of the court in the present case. But I am opposed to the application of those decisions to analogous cases, when the result is the enforcement of what I consider so unreasonable a rule of construction, as that obtaining in the present case.

WOODRUFF & PARKER vs. PARHAM.

[TRESPASS AGAINST TAX-COLLECTOR.]

1. *State taxation of imports.*—Held, on the authority of *Hinson v. Lott*, (40 Ala. 123,) that the provision contained in the tenth section of the first article of the constitution of the United States, which prohibits the

States to "lay any imposts or duties on imports," does not take away from the State the right to tax, or to delegate to a municipal corporation the power to tax, the sales of articles which have been brought here from other States of the Union, although they are sold by the importer in the form, bulk, and packages in which they are so imported.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by the appellants, against John Parham, to recover damages "for wrongfully taking the following goods and chattels, the property of the plaintiffs—that is to say, fifty barrels of whiskey, and twenty cases of dry goods;" and was commenced on the 1st November, 1866. The cause was submitted to the decision of the court below, on an agreed statement of facts, which is as follows:

"It is agreed in this case, that the defendant is the duly appointed and qualified tax-collector of the city of Mobile; that the city of Mobile is a municipal corporation, existing under the laws of Alabama; and the charter thereof, approved 2d February, 1866, is made a part of this agreement. It is agreed, that said corporation, claiming to act under the authority of said charter, passed an ordinance on the subject of taxation for city purposes, and thereby levied a tax of 50 cents on every one hundred dollars of the gross sales of merchandise sold within the city of Mobile. The ordinance upon this subject (pages 196 to 209 of the Municipal Code) is made a part of this agreed case. It is agreed that the plaintiffs are merchants, engaged in business in the city of Mobile, as auctioneers and commission-merchants. In the course of their business, and prior to the commencement of this suit, said plaintiffs, for their own account, or as consignees and agents for others, have imported or received from States of the United States other than the State of Alabama, and from beyond the limits and jurisdiction of the State of Alabama, to-wit, from the States of New York, Massachusetts, Pennsylvania, Ohio, Missouri, Georgia, and Louisiana, large quantities of goods and merchandise, the product or growth of said States, and sold the same in Mobile, to the amount of

\$300,000; and that a tax thereon, of 50 cents upon the hundred dollars, amounts to the sum of \$1500. All of said goods were sold by said plaintiffs, in Mobile, to consumers or purchasers, in the original packages, as they were received and imported into Alabama from said States; and they have sold none of said goods in broken packages, or at retail, but have dealt in such goods, which consisted mainly of liquors, dry goods, and tobacco, solely and only as they were imported in such original and unbroken packages, into the city of Mobile and State of Alabama. Said defendant has demanded of said plaintiffs the said amount of \$1500, as the tax legally due to the said city of Mobile, under and by virtue of the legislation, State and municipal, hereinbefore referred to. Said plaintiffs have refused to pay said tax so demanded, upon the allegation that the imposition thereof is illegal, and beyond the constitutional power of the State of Alabama to authorize, and of said municipal corporation to demand. To enforce the collection of said tax, and for no other purpose, the said defendant, in his said official character as tax-collector, has levied upon, and seized into his possession, the goods in the complaint mentioned. It is agreed that either party may refer to any statute of Alabama, and ordinance of the city of Mobile, that he may have occasion to use. If it be the opinion of the court, that the tax herein described is constitutional, and within the right and power of said city of Mobile to demand and enforce, then judgment shall be entered against the plaintiffs, for the costs of the suit; but, if it be the opinion of the court that said tax is illegal, and ought not to be enforced, then judgment shall be entered for plaintiffs, and against the defendant, for the sum of \$2100 damages, and costs of suit. The plaintiffs contend, that the tax claimed of them, and the statute of Alabama authorizing the same, are in violation of the constitution of the United States, paragraph 2, section 10, article 1. It is agreed that either of said parties may appeal from the judgment that may be rendered in the cause, to the supreme court of Alabama, at the first session thereof after the rendition of judgment by said circuit court, and the cause

be then argued and determined without further citation or delay."

"The court thereupon held, that the defendant was not liable, and rendered judgment for costs against the plaintiffs; to which the plaintiffs excepted," and which they now assign as error.

P. HAMILTON, for appellants.

W. BOYLES, and THOS. H. HERNDON, *contra*.

A. J. WALKER, C. J.—In this case, the constitutional power of a municipal corporation to tax the sales of articles brought into this State from other States of the Union, when sold in the form, bulk, and packages in which they were brought in, is involved. The appellant claimed in the court below, as he does in this court, a right of exemption from such tax, under the second paragraph of the tenth section of the first article of the constitution of the United States. He farther claims here, as he did in the court below, that the law, or ordinance, under which such tax was levied, contravenes the constitutional provision above stated. The question of the exemption from taxation claimed, and of the constitutionality of the law or ordinance under which the tax was levied, arose in the court below, and was decided against the appellant. Upon the authority of our decision in *Hinson v. Lott*, (40 Ala. 123,) we decide, that the appellant has not the right of exemption from taxation claimed, and that the law, or ordinance, under which the tax upon sales in the original package and bulk of articles brought into this State from other States, was levied, does not contravene the constitution of the United States; and we affirm the judgment of the court below.

KIRKSEY *vs.* HARDAWAY.

[MOTION BY SHERIFF FOR INSTRUCTIONS AS TO APPLICATION OF MONEY UNDER EXECUTIONS.]

1. *Agreed case.*—When a cause is submitted to the decision of the court on an agreed statement of facts, the court is not authorized to presume the existence of any other facts than those agreed on; nor will the appellate court indulge such presumption, even for the purpose of sustaining the judgment.
2. *Lien of judgments.*—In a contest among several judgment creditors, respecting the application of money on their several executions, the case being tried on an agreed statement of facts, and it not being shown whether the defendant in execution acquired the property before the rendition of the judgments, the issue of the executions, or the repeal of the acts of 1861 and 1863, the court can not allow a superior lien to the senior judgments.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. JAMES COBBS.

THE bill of exceptions in this case is as follows :

“ In this case, the sheriff of said county, having levied certain executions, hereinafter specified, upon the property of one Frederick L. Chiles, the defendant in said executions, and sold the same for the sum of twenty-nine hundred and ninety-three 87-100 dollars, brought the said money into court, and moved the court to apply the same according to law. The following are the facts of the case, as agreed upon by the parties and their attorneys : J. B. Clark recovered a judgment against said F. L. Chiles, April 15th, 1863, for \$991.61, and costs; the Eutaw Insurance Co., a judgment, 15th April, 1863, for \$2,315, and costs; J. A. Winston & Co., a judgment, 21st October, 1863, for \$4,000, and costs; F. M. Kirksey, a judgment for \$2,725.38, and costs, October 19th, 1863; all of which appeared of record in said court. It further appeared in evidence, that the following executions issued on said judgments, briefly described by dates, &c., as follows : Executions in favor of James B. Clark—

Kirksey v. Hardaway.

1st, dated June 1st, 1863, for interest and costs, which was returned 'satisfied,' September 23d, 1863; 2d, dated January 15th, 1866, for \$312.45, and costs, received in office January 16th, 1866, levied April 4th, 1866, and not sold for want of time; 3d, dated May 14th, 1866, received in office 19th May, 1866, under which, with other executions, the property was sold by the sheriff. Executions in favor of Eulaw Insurance Company—1st, execution dated June 1st, 1863, but ordered not to be delivered to sheriff; 2d, dated January 13th, 1866, received in office 15th January, 1866, levied April 4th, 1866, and not sold for want of time; 3d, execution dated May 14th, 1866, under which, with others, the property was sold by the sheriff. Executions in favor of John A. Winston & Co.—1st, execution dated January 23d, 1866, received January 27th, 1866, levied April 4th, 1866, and not sold for want of time; 2d, execution issued May 14th, 1866, received May 19th, 1866, under which, with other executions, the property was sold by the sheriff. Executions in favor of F. M. Kirksey—1st, execution dated 27th October, 1863, for interest and cost, endorsed as follows: 'Receive in payment for principal, interest, and costs, Confederate or State treasury-notes, at par value'; which was issued and delivered to the sheriff, who kept it in hand, but made no return on it; 2d, execution issued December 12th, 1865, received in office December 14th, 1865, levied April 4th, 1866, and not sold for want of time; 3d, execution issued May 9th, 1866, received in office May 19th, 1866, under which, with others, the property was sold. The court thereupon decided, that the money in the sheriff's hands, arising from the sale of F. L. Chiles' property, should be applied to the satisfaction of the executions in favor of James B. Clark and others, on judgments of April term, 1863, holding that the oldest judgments were entitled to the money; to which the said Kirksey excepted." &c.

The ruling of the court is now assigned as error.

W. P. WIER, for the appellant.

JAS. B. CLARK, and E. MORGAN, contra.

BYRD, J.—The bill of exceptions shows that the case

was tried on an agreed statement of facts, which are set out; which statement is silent as to the time when the defendant in execution acquired or owned the property levied upon and sold, except so far as the levy is evidence of the same. We can not, nor could the court below, under the rules of law, presume that the defendant acquired the property before the executions were issued, or the judgments were rendered, or the acts of 1861 and 1863 were repealed; and therefore the court below had no authority in law for holding that the senior judgments had any lien superior to the junior ones.

If the property sold was acquired after the repeal of the acts of 1861 and 1863, then the judgments were no lien on the property; and upon the record we are not authorized to presume that the property levied upon was acquired previous to the repeal of those acts. What is the result flowing from such a state of facts and presumptions, we will not intimate, as, on another trial, a very different state of facts may be presented for adjudication.

The court below erred in the judgment rendered, and it must be reversed and remanded.

NORRIS *vs.* SMITH ET AL.

[BILL IN EQUITY FOR REFORMATION OF DEED.]

1. *Variance*.—Where the bill alleged, that the complainant's husband, in taking a deed for certain lands purchased by him, "desired that the deed should convey the title to her in such manner that she and her husband could unite in re-conveying the same at any time, and make a perfect title to the purchaser;" and the deed, as executed, conveyed to the complainant a separate estate in the lands for life, with remainder to the children of her and her husband, and to the child which each of them had by a former marriage; while the proof showed, that his instructions to the draughtsman were, "that he wanted the land conveyed to his wife, and in such manner that the three sets of children should inherit it,"—there is a fatal variance between the allegations and the proof.

APPEAL from the Chancery Court of Shelby.

Heard before the Hon. THOS. B. WETMORE, as special chancellor, appointed under the provisions of section 611 of the Code, in consequence of the incompetency of the Hon. J. R. JOHN to preside.

THE bill in this case was filed, on the 6th August, 1863, by Mrs. Mary A. Norris, the wife of Jasper J. Norris, (who sued by J. J. Norris as her next friend,) against the three children of said Mary A. and Jasper J. Norris, (all of whom were minors,) together with Fanny L. Norris, (who was a child of said Jasper J. by a former wife,) John S. Leach, (who was a child of said Mary A. by a former husband,) James H. Smith, and Eliza A. Smith, his wife. The object of the bill was to reform a deed of conveyance for certain lands, which were purchased by said Jasper J. Norris, from said Smith and wife. The deed, which was made an exhibit to the bill, and was dated the 6th December, 1861, purported to be made between said Smith and wife, as parties of the first part, "and Mary A. Norris, to her sole and separate use and benefit, for and during her natural life, and then to her children and the children of Jasper J. Norris, her husband, by their different marriages, of the second part;" and conveyed the land "to the said party of the second part." The following are the averments of the bill as to the mistake, on account of which a reformation of the deed was sought :

"Your orator further shows, that her said husband desired that the deed for said lands should convey the title to her, in such manner that she and her said husband could unite in re-conveying the same, at any time they might desire to do so, and make a perfect title to the purchaser of said lands; that her said husband attended to the preparation of the deed, and procured the services of John M. McClanahan, esq., to draw the deed; that said McClanahan drew the deed, a copy of which is hereto attached," &c.; "that your oratrix is unskilled in such matters, and her said husband has but little knowledge of conveyances and legal process; that she has been advised, and so charges, that said deed conveys to her only a separate

estate for life, and conveys the remainder to Fanny L. Norris" and the other children who are made defendants to the bill; "that it never was the intention of her said husband, or herself, to have the said deed so drawn as to convey to the said children any vested right to said lands. Your oratrix charges, that said deed, as prepared and executed, was so drawn and prepared by mistake; that she did not find out, until recently, that said children had a vested right in said land, and that she could only convey a life-estate in said lands, and that she and her said husband could not dispose of the said lands so as to give the purchaser a complete and fee-simple title. And she charges, either that her said husband gave improper and erroneous instructions by mistake, or that the draughtsman made a mistake in drawing the said deed. She is certain, and therefore charges, that said deed is not in accordance with the intentions of herself and husband, and that there was no motive to make it otherwise; that it is, therefore, the result of mistake."

To prove the alleged mistake, the complainant took the deposition of said John M. McClanahan, whose testimony on that point was in these words: "I am satisfied that a mistake did occur in the preparation of said deed—1st, in the instructions which Mr. Norris gave me; and, 2d, in my not explaining to him what would be the legal effect of the deed. In fact, the legal effect of the deed did not occur to me at the time. It was not the intention of Mr. Norris or myself to place the land beyond the control of Norris and wife during their life-time. Mr. Norris came to me, and told me, that he had purchased the Shelby Springs tract of land; that he had a child by a former marriage, and his wife had a child by a former marriage, and they had children who were the offspring of their marriage; and that he wanted the land conveyed to his wife, and in such manner that the three sets of children above specified should inherit the land. He gave as a reason for this, that he was in bad health, and entertained fears that he might die suddenly; that there was litigation pending against him, but he had means enough, outside of the place, to meet the litigation; but that he desired, in the event of his death,

that the three sets of children should inherit the land. The mistake was in this—that Mr. Norris attempted to do by deed what should have been done by will. I suppose that, if Mr. Norris had known the legal effect of the deed, it would have been to Mrs. Norris, or to Norris and wife.”

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

J. R. JOHN, and S. LEIPER, for the appellant.—It is very clear from the testimony that the deed was not drawn according to the intention of the parties; and it is equally clear, from McClanahan’s own testimony, that he did not understand the instructions, and did not know how to draw the deed. The evidence substantially sustains the allegations of the bill, and brings the case within the principle of the following decisions of this court: *Stone v. Hale*, 17 Ala. 561; *Whitehead v. Brown*, 18 Ala. 683; *Larkins v. Biddle*, 21 Ala. 252; *Trapp & Hill v. Moore & Borden*, 21 Ala. 693.

JUDGE, J.—The lands described in the bill in this case, were purchased by Jasper J. Norris, the husband of the complainant, and were paid for by Norris, out of his own means. At the time of the intermarriage of Norris with complainant, each had one child by a former marriage; and at the time of the execution of the deed, which is the subject of the suit, two children, the offspring of the intermarriage of Norris with complainant, had been born, and were living. It is averred in the bill, that, on the purchase of the lands from Smith, the husband of complainant “desired that the deed for the lands should convey the title to complainant, in such manner that she and her husband could unite in reconveying the same, at any time they might desire to do so, and make a perfect title the purchaser.” It is not averred that this “desire” was communicated to the draughtsman of the deed, either before, or at the time of its preparation; nor is it averred that any instructions were communicated to him as to how the deed should be drawn. It is averred that the deed, as executed, (and such perhaps is its legal effect,) conveys to the com-

plainant a separate estate for life only in the lands, with remainder over to the three sets of children above designated; and that such a conveyance of the lands was not in accordance with the intention of complainant and her husband, but was the result of mistake.

The evidence of McClanahan, the draughtsman of the deed, shows, that he was instructed by the husband of the complainant to draw the deed "in such manner that the three sets of children above specified should inherit the land;" "that he desired that, in the event of his death, the three sets of children should jointly *inherit* the land." It is not necessary to inquire whether, by mistake or accident, the deed was so drafted, as that it fails to accomplish the intention of the parties; the relief prayed for was properly refused, for the reason, if no other, that there is a want of correspondence between the allegations of the bill and the evidence. If a case be established by the evidence, it is inconsistent with the allegations of the bill, and there is therefore, no error in the decree of the chancellor.—Shepherd's Digest, 242, § § 4, 5, 6.

Decree affirmed, with costs.

BYRD, J., not sitting.

RAGLAND'S EXECUTORS *vs.* MORTON.

[BILL IN EQUITY FOR SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS, AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Presumption of settlement after lapse of twenty years.*—In the absence of special circumstances, an administrator may be called to a final settlement of his accounts and vouchers at the expiration of eighteen months from his appointment; and if the parties interested in the estate suffer twenty years after that time to elapse, without taking any steps to compel a settlement, the lapse of time raises a presumption of settlement, and is fatal to any relief.
2. *Pleadings as to lapse of time, or statute of limitations.*—The lapse of

time, or the statute of limitations, is available as a defense in equity on demurrer; and if there are any special circumstances, which bring the case within any exception to the general rule, they must be averred in the bill, or by way of special replication to a plea.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. S. K. McSPADEN.

THE bill in this case was filed, on the 6th August, 1860, by Daniel S. Morton, against John W. Scruggs and Robert B. Lindsay, individually, and as executors of the last will and testament of George O. Ragland, deceased, together with the children and heirs-at-law of said Ragland and his deceased wife; and sought to compel a settlement of said Ragland's administration on the estate of David Morton, deceased, and a decree for the complainant's distributive share of said estate, or of the assets belonging to said estate for which said executors or their testator might be found liable. According to the allegations of the bill, said David Morton died, intestate, in Franklin county, Alabama, prior to September, 1833; leaving his widow, Mrs. Mary Morton, and his two sons, Quinn and David S. Morton, as his heirs-at-law and distributees. In September, 1838, Mrs. Mary Morton married said George O. Ragland, by whom she afterwards had several children; and she died, intestate, in 1858, leaving her husband and children as her distributees and heirs-at-law. "On or about the 6th December, 1833, said George O. Ragland was duly appointed, by the probate court of Franklin county, administrator *de bonis non* of the estate of said David Morton, deceased, and took upon himself the burden and duties of said office as administrator. At the March term, 1839, said Ragland, as such administrator, recovered a judgment for one hundred and eleven 90-100 dollars, against one John W. Hodges, who was the former administrator of said estate, and who had resigned, or been removed; and said Ragland afterwards collected said judgment from said Hodges. Said Ragland, as such administrator *de bonis non*, possessed himself of other personal property belonging to said estate, amounting in value to twenty thousand dollars and up-

wards. Said Ragland never returned to said probate court of Franklin an inventory of the property in his possession belonging to said Morton's estate; never made a final settlement of said estate, nor annual settlements of the same, but treated and managed the property as his own—worked the negroes of the estate with his own, for his own use and benefit, keeping no account of their hire, profits, or services; removed them from this State, without legal authority; carried them, at one time, to Memphis, Tennessee, where he kept them for several years; then moved them to Chattanooga, and afterwards to Madison county, Alabama, and sold some of them without authority; and the balance of the negroes belonging to the estate of said David Morton are now employed by said Scruggs and Lindsay, for the profit and benefit of the estate of said Ragland. Said George O. Ragland departed this life some time in the year 1858, having made and published his last will and testament, in which he appointed said John W. Scruggs and R. B. Lindsay the executors thereof; and said Scruggs and Lindsay, soon after the death of said testator, duly proved said will in the probate court of Franklin county, and took upon themselves the burden and execution thereof." A copy of the will of said Ragland was not made an exhibit to the bill; nor was there any reference in the bill, or in any of the amendments thereto, to the annual or partial settlement of his accounts by said Ragland in 1844, which is mentioned in the opinion of the court.

The executors filed an answer, in which they incorporated a demurrer for want of equity, and on account of the lapse of time and the staleness of the demand; and they also pleaded the statute of limitations and the staleness of the demand, as a bar to the relief sought. The chancellor overruled the demurrer, and, on final hearing on pleadings and proof, rendered a decree for the complainant. The overruling of the demurrer, and the final decree of the chancellor, are now assigned as error. There was also, by consent, a cross assignment of errors by the complainant, which requires no particular notice.

WALKER & BRICKELL, for the appellants, cited *Maury v.*

Mason, 8 Porter, 211; *Johnson v. Johnson*, 5 Ala. 90; *Nimmo v. Stewart*, 21 Ala. 642; *Austin v. Jordan*, 35 Ala. 642; *Stearns v. Page*, 1 Story, 204; *Bertine v. Varian*, 1 Edw. Ch. 343; *McKnight v. Taylor*, 1 How. (U. S.) 161; *Ordinary v. Stedman*, 1 Harper's Law R. 287.

F. P. WARD, *contra*.—The statute of limitations does not run in favor of trustees.—Angell on Limitation, 164; *Rhodes v. Turner and Wife*, 21 Ala. 210. The presumption of payment does not arise in the case—1st, because twenty years, exclusive of Ragland's absence from the State, had not elapsed when the bill was filed; 2d, because the distributees were infants, and there was no one to sue; 3d, because Ragland, in his will, admits his liability; and, 4th, because of the partial settlement in 1844, set up in the answer of the executors.

BYRD, J.—George O. Ragland having been appointed administrator *de bonis non* of the estate of David Morton, on the 6th December, 1838; and the bill in this case having been filed on the 6th of August, 1860, against the executors of the will of Ragland, for a settlement of his administration upon the estate of Morton; and the executors having interposed a demurrer to the bill, and assigned the lapse of time as one of the grounds of demurrer, we are of opinion that, under the allegations of the bill, and the amendments thereto, the demurrer should have been sustained.—*Nimmo v. Stewart*, 21 Ala. 692; *Johnson v. Johnson*, 5 Ala. 90; *Worley's Adm'r v. High*, 40 Ala.

The fact that Ragland removed the slaves from this State, to the State of Tennessee, and kept them there for several years, does not relieve the case from the influence of the rule recognized as established in this State in the case of *Austin v. Jordan*, (35 Ala. 642,) and the cases therein cited. See, also, the case of *Bone and Wife v. Jordan*, decided at the last term.—40 Ala.

The bill, when construed by the rules applicable to pleadings in equity, does not show a continuing trust on the part of Ragland, nor any act or admission of his, within twenty years next preceding the filing of the bill, of such a trust,

or any trust, which would bring the case within any exception to the rule, or relieve the case from its operation. If there are any acts, or admissions of Ragland, which would do so, they should have been averred in the bill, or by way of special replication.—*Maury v. Mason*, 8 Porter, 211 *Johnson v. Johnson*, *supra*.

We intimate no opinion upon the question, whether the case would be relieved from the influence of the rule alluded to, if the appellee had set out the contents of the will of Ragland in his bill, or had set up the partial settlement, made in 1844, as a reply to the objection of lapse of time. We think it safer not to decide the question, until it is properly raised on the record, and argued.

The decree of the chancellor, overruling the demurrer to the bill, must, upon the ground noticed, be reversed.◊

It is unnecessary for us to consider any other question raised by the assignment and cross assignment of errors, in the present condition of the record; and we prefer not to express an opinion upon them, in advance of their proper presentation upon the record; for it may be, that this case will have to go off, in the end, on the point of lapse of time.

It may be that appellee can amend his bill, so as to bring his case within some exception to, or relieve it from the influence of, the general rule established by the adjudications referred to in the cases of *Austin v. Jordan*, and *Bone and Wife v. Jordan*, *supra*. To enable him to take such course as he may be advised, we will not render a decree dismissing the bill, but will reverse the decree of the chancellor, for the error pointed out, and remand the cause.

CLARK ET AL. *vs.* JONES ET AL.

[CREDITORS' BILL TO SUBJECT EQUITABLE ASSETS TO JUDGMENTS.]

1. *Effect of answer as evidence; proof of executions.*—Where judgment creditors, who have exhausted their legal remedies, file a bill in equity to reach equitable assets of their debtor, the issue and return of executions on their judgments, as alleged, is a matter which is presumed to be within the debtor's knowledge; consequently, his failure to either admit or deny, in his answer, the allegations of the bill as to that matter, is an admission of their truth; and the issue and return of the executions, as alleged, being thus established as against him, his co-defendant, in whom is vested the legal title to the land sought to be condemned, and whose prior lien is allowed by the decree, can not insist on other proof of those facts.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed, on the 10th March, 1860, by Henry C. Jones, John Peters, and Richard B. Baugh, as judgment creditors of Samuel S. Clark, against said Clark and John W. Scruggs; and sought to reach and subject to the satisfaction of the complainants' several judgments said Clark's interest in a certain lot, or tract of land, which was situated in said county of Madison, and the legal title to which was held by said Scruggs. The judgment of said Henry C. Jones was rendered, by the circuit court of Madison, on the 24th February, 1859; and the judgments of said Peters and Baugh were rendered by the circuit court of Lauderdale, at its April term, 1859. The bill alleged, that executions on these judgments were regularly issued, and returned "No property found"; that said Clark had purchased from said Scruggs, his co-defendant, two or three years before the bill was filed, the lot, or tract of land, which the bill sought to condemn, and had erected valuable improvements upon it; that the complainants were ignorant of the terms of the contract between Clark and Scruggs, and did not know how much of the stipulated purchase-

money had been paid by Clark ; that he had done a great deal of work for Scruggs, and had paid the greater part of the purchase-money in that way, and that Scruggs still retained the legal title to the lot. The interrogatories appended to the bill, which each of the defendants was required to answer, sought a discovery as to the terms of the contract between Clark and Scruggs, the amount due to Clark for work done, the balance of purchase-money due to Scruggs, &c. The bill prayed an account of the amounts due to the complainants on their respective judgments, and an account between Clark and Scruggs of the transactions between them ; that the lot and improvements might be sold, and the proceeds of sale applied, after paying any balance due to Scruggs, in satisfaction of the complainants' judgments ; and for other and further relief, according to the facts of the case.

Separate answers were filed by the defendants. The answer of Clark, or the material portion thereof, was as follows: "The debts and judgments, as set forth in complainants' bill, are believed to be correct. In answer to the other matters inquired of, respondent saith, that he has read the answer of his co-defendant, John W. Scruggs, that the same is true and correct, and he adopts it as his answer. The whole contract between respondent and said Scruggs was and is in parol ; and respondent pleads, in short, the statute of frauds." The answer of Scruggs denied all personal knowledge of the complainants' debts and judgments against Clark, and of the issue and return of executions thereon ; and he prayed that the complainants might be held to strict proof of the allegations of the bill as to these matters. He also set out the terms of the contract between said Clark and himself, and claimed that, under said contract, there was a balance of more than fifteen hundred dollars due him, for moneys advanced, &c., and that he had a lien on the lot and improvements thereon for the payment of that balance.

The cause was submitted for final decree, "on the pleadings"; and the chancellor thereupon rendered a decree for the complainants, and ordered a sale of the land by the register, "subject to the lien of said Scruggs for the unpaid purchase-money due to him under the contract with

said Clark," and directed the residue of the proceeds of sale to be applied to the payment and satisfaction, *pro tanto*, of the complainants' several judgments.

The appeal was sued out by both of the defendants, and the chancellor's decree was assigned as error by them jointly.

WALKER & BRICKELL, for appellants.—The jurisdiction of the court in this case was dependent on the concurrent facts of judgments, executions thereon, and the return of those executions unsatisfied, as alleged in the bill.—*Morgan v. Crabb*, 3 Porter, 470; *Vandegraaf v. Medlock*, 3 Porter, 392; *Roper v. McCook*, 7 Ala. 319; *Reese v. Bradford*, 13 Ala. 837; *Sanders v. Watson*, 14 Ala. 198. The answer of Clark admits the debts, and judgments thereon, as alleged; but it is silent as to the issue and return of the executions, and adopts the answer of his co-defendant; while the answer of Scruggs denies all personal knowledge of the judgments and executions, and requires proof thereof. The answers were clearly insufficient, and subject to exception; but, not having been excepted to, the complainants were bound to prove the averments of the bill which were not admitted.—*Savage v. Benham*, 17 Ala. 119; *White v. Wiggins*, 32 Ala. 424; *Young v. Grundy*, 6 Cranch, 51; *McArthur v. Phœbus*, 2 Ohio, 487; 2 Daniell's Ch. Pr. 984, note.

RICE, SEMPLE & GOLDTHWAITE, *contra*.—The issue and return of executions, as alleged, on the judgments against Clark, are matters which are presumed to be within his personal knowledge; and his failure to admit or deny, in his answer, the allegations of the bill as to these facts, is an implied admission of their truth.—*Price's Adm'r v. Boswell*, 3 B. Monroe, 18; *Neal v. Ogden*, 5 Monroe, 362; *Lawless v. Blakey*, 5 Monroe, 489; *Grady v. Robinson*, 28 Ala. 289; *Reading v. Ford's Heirs*, 1 Bibb, 338; Story's Equity Pleadings, §§ 854-5, and notes.

PER CURIAM.—We think the authorities establish the proposition, that a matter alleged in a bill can only be regarded as admitted by the failure of the defendant to

answer, when it can either be presumed to be, or is alleged to be, within the defendant's knowledge.—*Thorington v. Carson*, 1 Porter, 257; *Bank of Mobile v. P. & M. Bank of Mobile*, 8 Ala. 772; 3 Greenl. on Ev. § 276; *Cowan v. Price*, 1 Bibb, 173; *Moore v. Lockett*, 2 Bibb, 67; *Pearson v. Meaux*, 3 A. K. Marsh. 4; *Moseley v. Garrett*, 1 J. J. Marsh. 212, 215; *Mitchell v. Maupin*, 3 Mon. 185; *Kennedy v. Meredith*, 3 Bibb, 465; *Tate v. Conner*, 1 Dev. Eq. 224; *Lunn v. Johnson*, 3 Ired. Eq. 70; *Cropper v. Burtons*, 5 Leigh, 426; *Coleman v. Lynes*, 4 Rand. 454; *Kirkman v. Vanlier*, 7 Ala. 217. So, also, it is settled, that an evasive answer is not an admission.—*White v. Wiggins*, 32 Ala. 424; *Savage v. Benham*, 17 Ala. 119.

The defendant Clark admits the debts and judgments, as alleged; but his answer is silent in reference to the allegation of the issue and return of executions. We think these facts are, so far as all the executions are concerned, presumed to be within the knowledge of the defendant Clark, and therefore, *prima facie*, within his knowledge. We cite, in support of our position, the following authorities: *Kirkman v. Vanlier*, *supra*; *Grady v. Robinson*, 28 Ala. 289; *Smilie v. Siler*, 35 Ala. 94.

The issue and return of executions were matters of necessary evidence, only as against the defendant Clark. It was a matter in which the other defendant (Scruggs) was not at all interested. Those facts were, therefore, sufficiently proved, by the implied admission of the defendant Clark's answer.—*Hartley v. Bloodgood*, 16 Ala. 233. By the direct and implied admission of Clark's answer, the judgments, executions, and returns upon them, are established; and this being the only point on which the decree of the court below is attacked, it must be affirmed.

Affirmed.

WALKER'S ADM'R vs. WALKER'S ADM'R.

[ACTION ON COMMON COUNTS, BY WIFE'S, AGAINST HUSBAND'S ADMINISTRATOR.]

1. *Husband's interest in wife's personally.*—At common law, where an estate in personalty vested in the wife under a will, and became a legal interest by the assent of the executor, and went into the possession of the person in whom was vested the precedent particular estate, and no adverse possession was shown, such estate passed to the husband by virtue of his marital rights; but the wife's distributive share of an intestate's estate did not vest in the husband, unless he reduced it to his possession before the death of the wife.
2. *Presumed existence of common law in other States.*—In the absence of proof to the contrary, the common law will be presumed to exist in other States, unaffected by statutory provisions.
3. *General charge on evidence.*—A charge to the jury, instructing them that, "if they believed the evidence, they must find for the defendant," is equivalent to a demurrer to evidence and joinder therein; and such charge should never be given, where the jury could legally find a verdict against the party in whose favor it is given.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Cleveland Croft, as the administrator of Mrs. Matilda Walker, deceased, against Mrs. Martha T. C. Walker, as the administratrix of Jethro Walker, deceased, who was the husband of said Matilda Walker; and was commenced on the 21st February, 1860. The complaint contained the common counts, on an account stated, and for money had and received. The record does not show what pleas were filed. The object of the action was to recover the sum of nine hundred and nine 95-100 dollars, with interest thereon, which the said Jethro Walker received, on the 20th July, 1853, from George W. A. J. Walker, the administrator of Mrs. Matilda Walker in Georgia, as her share of the property coming to her under the will of her deceased father, John S. Zachary. On the trial, as the bill of exceptions shows, it was admitted that

the plaintiff was the legal administrator of the estate of Mrs. Matilda Walker, and that the defendant was the legal administratrix of the estate of said Jethro Walker; and, in addition to these admissions, the only evidence adduced was as follows: 1st, the receipt of said Jethro Walker, to said George W. A. J. Walker, for the money sought to be recovered; 2d, a written admission of counsel; and, 3d, a transcript from the records of the superior court of Jones county, Georgia, showing the proceedings therein had, in a certain cause, hereinafter more particularly described, connected with the estate of said John S. Zachary.

The receipt, which was dated the 20th July, 1853, and signed by said Jethro Walker, was in these words: "Received of George W. A. J. Walker, administrator of my deceased wife, Matilda Walker, the sum of nine hundred and nine dollars and ninety-five cents, in full payment of the share coming to her under the will of her father, the late John Zachary, as ascertained and determined by a decree and judgment in the superior court of Jones county."

The agreement of counsel was as follows: "It is agreed in this case, that John S. Zachary was the father of Mrs. Matilda Walker, and died in Jones county, Georgia, in 1841, leaving his will, which was duly admitted to probate, in said county of Jones, in 1841; and that the exhibit to the transcript from the records of the superior court of said county of Jones is a correct copy of said will; and that said Matilda Walker died, in 1844, in Macon county, Alabama, where she was then residing with her husband, said Jethro Walker; and that Mrs. Eliza Zachary, the widow of said John Zachary, and the mother of said Matilda Walker, died in 1849; and that George W. A. J. Walker was appointed administrator of the estate of said Matilda Walker, by the ordinary of said county of Jones, in July, 1850; and that the said George W. A. J. Walker, as such administrator, recovered from the executor of the said John S. Zachary, in October, 1851, in the superior court of said county of Jones, the sum of eight hundred and eighty-two 67-100 dollars, being the share of the said Matilda in the property bequeathed by the third item of the will of said John S. Zachary, to Mrs. Eliza Zachary for life, which

property had been sold by the said executor ; and that said sum, with the interest thereon, amounting in the aggregate to the sum of nine hundred and nine 95-100 dollars, was received by the said Jethro Walker, from the said George W. A. J. Walker, as such administrator, as per his receipt, which is admitted ; and that the said John S. Zachary was residing in said county of Jones at the time of his death. It is agreed, also, that the transcript from the records of the superior court of said county of Jones, in the case of George W. A. J. Walker v. Abner S. Zachary, may be used as evidence on this trial as often as may be necessary ; and that the property mentioned in the third item of said will went into the possession of the said Eliza Zachary, after the probate of said will and the qualification of said executor, and was used and enjoyed by her during her life, by and with the consent of said executor."

The transcript from the records of the superior court of Jones county, Georgia, showed the proceedings had under a bill in equity, filed in said court, on the 31st August, 1850, by said George W. A. J. Walker, as the administrator of the respective estates of Matilda Walker and Mary Ann Harrison, deceased, (both of whom were daughters of said John S. Zachary,) against Abner S. Zachary, as the executor of the last will and testament of said John S. Zachary ; and sought a discovery and account of the assets of the estate, and a decree for the respective distributive shares of the complainant's intestates ; and particularly as to the property embraced in the third item of the testator's will, which was in these words : "After the payment of my just debts, I wish my wife, Eliza Zachary, to have given to her, at fair valuation, an equal portion of the negro property with the other legatees, and such negroes as she may select ; also, an equal portion of the household and kitchen furniture, horses, cattle, and hogs, with provisions sufficient for one year ; also, the privilege of timber from the wood lands, if, in the selection of her dower, she may choose the cleared land ; to use and enjoy the aforesaid property during her natural life, and at her death to revert to the surviving legatees." The point of controversy in the case was the meaning of the words "*surviving legatees*" in this clause ; the complain-

ant insisting, that it included all the legatees who were living at the death of the testator, his intestates being two of them ; while the executor contended, that it meant only the legatees who were living at the death of the widow, and thus excluded the complainant's intestates, both of whom died before the widow. A decree was rendered in the cause, on the 21st October, 1851, on the verdict of a jury, in favor of the complainant, as the administrator of each of his intestates, for eight hundred and eighty-two 67-100 dollars ; and this is the decree which was afterwards paid to said Jethro Walker, and the money sought to be recovered in this case.

“This was all the evidence in the cause on the trial. Upon that evidence, the court charged the jury, that, if they believed all the evidence, they must find for the defendant”; to which charge the plaintiff excepted, and which he now assigns as error.

GRAHAM & ABERCROMBIE, for appellant.—1. An action for money had and received lies against the husband, in favor of the wife's administrator, to recover money paid over to him under a legacy to her, to which his marital rights never attached.—*Johnson v. Johnson*, 33 Ala. 284.

2. The husband's marital rights never attached to the money in this case. He never had constructive possession of it during coverture, and reduced it to actual possession several years after the death of the wife. The question is not, whether he had a right to reduce it to possession, but whether he did in fact reduce it to possession. The Georgia record shows, that the executor disputed the wife's right to the legacy, and that her administrator was compelled to assert her right by suit ; and this judgment, being unreversed, cannot be collaterally impeached.—*Trustees of University v. Kellar*, 1 Ala. 406 ; *Slaughter v. Cunningham*, 24 Ala. 260. The executor's assent to the legacy to the tenant for life, therefore, was a constructive assent to the legacy to those remainder-men only whose right he admitted.—*George v. Goldsby*, 23 Ala. 333 ; 1 Roper on Legacies, (3d ed.) 736 ; 10 Vesey, 242. The husband, then, having had neither actual nor constructive possession during cov-

erture, his marital rights never attached.—*Hair v. Avery*, 28 Ala. 273; *Gibson v. Land*, 27 Ala. 129; *Mason v. McNeill*, 23 Ala. 201; *Machen v. Machen*, 28 Ala. 374; *Lockhart v. Cameron*, 29 Ala. 363; *Clancy on Husband and Wife*, 8-9.

D. CLOPTON, *contra*.—1. The husband was not concluded by the Georgia record, to which he was neither a party nor privy.—*McLelland v. Ridgeway*, 12 Ala. 482; *Crutchfield v. Hudson*, 23 Ala. 393. Neither was he concluded by his receipt to George W. A. J. Walker.—*Hopper v. McWhorter*, 18 Ala. 229; *Winston v. Westfeldt*, 22 Ala. 760; *Gamble v. Gamble*, 11 Ala. 966; *Jordan v. Autrey*, 10 Ala. 276.

2. The executor's assent to the legacy to the tenant for life, was an assent to the legacy in remainder; and the husband thereby became, by virtue of his marital rights, a tenant in common with the other remainder-men.—*Gibson v. Land*, 27 Ala. 130; *Walker v. Fenner*, 28 Ala. 367. That this was a sufficient reduction to possession, is conclusively settled by the following cases: *Pitts v. Curtis*, 4 Ala. 350; *Magee v. Toland*, 8 Porter, 37; *Chambers v. Perry*, 17 Ala. 726; *Hopper v. McWhorter*, 18 Ala. 229; *Gwynn v. Hamilton's Adm'r*, 29 Ala. 233.

BYRD, J.—1. It may now be considered as settled, by repeated decisions of this court, that where an estate in personalty has vested in the wife under a will, and by the assent of the executor it has become a legal interest, and the possession is with the person in whom the precedent particular estate is vested, and no adverse possession is shown, such estate of the wife passes to the husband by virtue of his marital rights, at common law. There are expressions used in the opinions of this court, in the cases of *Mason v. McNeill*, (23 Ala. 208,) and of *Hair et al. v. Avery et al.*, (28 Ala. 267,) and perhaps in other cases, which may militate against this doctrine as stated; but we conceive it to be fully sustained by the following decisions: *Magee v. Toland*, 8 Porter, 36; *Pitts v. Curtis*, 4 Ala. 350; *Broome v. King*, 10 Ala. 819; *Chambers v. Perry*, 17 Ala. 736; *Gibson v. Land*, 27 Ala. 117; *Walker v. Fenner*, 28 Ala. 367; *Williams v. Avery*, 38 Ala. 115. It is also settled,

that, at common law, if a *femme covert* is entitled to a distributive share of an estate, and she dies before the husband reduces it to possession, no title thereto vests in him, but it goes to her personal representative.—*Hair v. Avery*, 28 Ala. 267, and authorities therein cited. These propositions are stated as the result of the decisions of this court upon common-law principles, and not upon the statutory law of this State.

2. In the absence of any proof on the subject, we will presume that the common law is, and was, in force in the State of Georgia, and that there was no statute law in conflict therewith. When Matilda Walker died, these propositions were the settled law of this State, unaffected by any statutory enactments.

3. In this case, it does not appear from the evidence that the executor assented to the legacy, and delivered possession of the property to the tenant for life, before the death of Matilda Walker. The charge given by the court is equivalent to, and must be treated as, a demurrer to the evidence, and a joinder therein by the appellant.—*Hollingsworth v. Martin*, 23 Ala. 591. The court should not give such a charge, where the jury could legally find a verdict against the party in whose favor the charge was given.—*Mims v. Central Bank*, 2 Ala. 296. A demurrer to evidence admits every fact which the testimony tends to establish, or which the jury might properly infer from the testimony.

In this case, upon the points argued by counsel, the appellant introduced evidence, upon which the jury might have legally found a verdict in his favor. It devolved on the appellee to show, that the property bequeathed by the 3d item of the will went into the possession of the tenant for life before the death of Matilda Walker. Whether that would have been a good defense to this action, under the other facts of this case, we intimate no opinion, as counsel have argued this case upon the supposition, that the record showed that the tenant for life had obtained possession of the property, by the assent of the executor, before the death of the remainder-man. In such a case as this, the court should not have given the charge it did.—*Henderson*

v. Mabry, 13 Ala. 713 ; *Armstrong's Executor v. Armstrong*, 29 Ala. 538 ; *White v. Hass*, 32 Ala. 432 ; *Memphis & Charleston Railroad Co. v. Bibb*, 37 Ala. 699.

There are other questions, which might have been raised upon the evidence and the charge of the court ; but, as they have not been argued, and the evidence may be different on another trial, we shall not notice them.

The judgment must be reversed, and the cause remanded.

SOWELL vs. SOWELL'S ADM'R.

[APPLICATION TO REVOKE PROBATE OF WILL AND GRANT OF LETTERS OF ADMINISTRATION.]

1. *Notice of probate.*—On an application to revoke and set aside the probate of a will, on the ground that notice was not given to the parties who were by law entitled to notice, if the record shows that the court ordered notice to be given “as the law directs,” and the decree admitting the will to probate recites, that notice was given “in pursuance of law, and in strict accordance with the former order of the court” ;—these recitals, if no evidence is introduced to contradict them, will be held sufficient to sustain the probate.
2. *Waiver of right to administration, and premature grant of letters.*—A grant of letters of administration, made before the expiration of forty days from the death of the testator or intestate, (Code, §§ 1662-3, 1669,) though premature, will not be set aside on that account, on the application of a person who had a prior right to the grant of letters, when the record shows that no application for the grant of letters was made by him, or by any other person having a prior right, within the time prescribed by law.

APPEAL from the Probate Court of Dale.

IN the matter of the estate of George Sowell, deceased, on the petition of Robert G. Sowell to set aside the probate of the last will and testament of said decedent, and to revoke the letters of administration granted by said court to George N. Traywick. The petition was filed on the 10th

March, 1866, and alleged, that said decedent died on the 11th day of September, 1863, after having made and published his last will and testament, of which the petitioner and one F. D. Traywick, since deceased, were appointed the executors; that said will was propounded for probate in said court, on the 21st September, 1863, by George N. Traywick, who, in the same petition, prayed for the grant of letters of administration to himself; that said Traywick was neither a legatee or devisee under the will, nor a distributee of the decedent's estate, nor a creditor, nor in any manner interested in the estate, and had no right to propound the will for probate, and no right to apply for the grant of letters to himself; that said probate court admitted said will to probate on the 12th October, 1863, and, on the same day, granted letters of administration, with the will annexed, to said George N. Traywick; that the petitioner in this case, who was a son of the decedent, and was named in the will as one of the executors, was absent from the State, in the army of the Confederate States, when these proceedings were had in the probate court, and had no notice of them, and that he had never renounced the executorship of the will. The probate court dismissed the petition, because it was not stamped according to the provisions of the internal-revenue laws of the United States; but the decree of the probate court was reversed by this court, at its June term, 1866, and the cause was remanded.—See the case reported in 40 Ala. 243.

On the hearing at the October term, 1866, after the remandment of the cause, as the bill of exceptions in the present record shows, "the petitioner introduced in evidence the records of said court, showing all the proceedings appertaining to the probate of the will of said deceased, and the grant of letters of administration, with the will annexed, to the defendant. The order appointing a day to hear the application for probate of the will, after reciting the averments of the petition, is as follows: "It is therefore ordered by the court, that the 12th day of October, 1863, be set as a day for hearing proof of said instrument as a will; that said heirs have due notice, as the law directs; that said minors have

due notice, as the law directs; and that Q. L. C. Franklin be, and he is hereby, appointed to act as guardian *ad litem*, to represent and protect the minor heirs of said deceased." The order admitting the will to probate, after reciting the appearance of the applicant and the guardian *ad litem* of the infant heirs, proceeds—"And it appearing to the satisfaction of the court that notice of the said application, and of the time appointed for hearing the same, has been given in pursuance of law, and in strict accordance with the former order of this court, made and entered in the premises on the 21st September, 1863, by notice given as the law directs, and according to the former order of this court," &c. "The other proceedings in the estate, subsequent to said probate, were also in evidence," and are set out in the bill of exceptions, but require no special notice. "The petitioner objected to the allowance of those other proceedings as evidence; which objection was overruled by the court, and the petitioner excepted." Evidence was also introduced, which showed that, at the time letters of administration was granted to said Traywick, the estate of the decedent was not under the control of any adult person, and was liable to be wasted; that the petitioner was at that time absent from the State, and in the military service of the Confederate States; that at the sale of the property belonging to the estate, which was made by the administrator, under an order of the probate court, in October, 1863, most of the slaves were bid off by the petitioner, through an agent, and went into the possession of his wife under the purchase, and remained under her control until the close of the war; that the defendant still owed the estate, on account of his purchase of the slaves, several thousand dollars; and that he had expressed his satisfaction with the proceedings of the administrator, by letter and in conversation, before his petition in this case was filed. Several exceptions were reserved by the petitioner to the rulings of the court in connection with this evidence, and to the competency of some of the witnesses; but these exceptions require no particular notice.

"This being all the evidence, the court refused to grant

the prayer of the petitioner," and rendered the following decree: "This was a petition to set aside the probate of the will of George Sowell, deceased, heretofore made on the 12th October, 1863. It appearing to the satisfaction of the court, by the records, that notice had been given to the petitioner of the application to prove said will, who was out of the State, in the service of the Confederate States; he being regarded as a non-resident, under the act of the general assembly of 1862; said notice having been given by posting notices at the court-house and three other public places in said county, (it being officially known to the court that said notice was given,) there being no newspaper published in this county at that time; and it being further shown to the court that said petitioner made no complaint of said probate, and has expressed himself as glad that the defendant had taken charge of the decedent's estate, about or soon after said probate of said will, and had purchased, or assented to the purchase of property, to-wit, negroes, at the sale of said decedent, which negroes were held by him until they were set free by the authority of the United States, and *is still due* some six thousand dollars on said purchase,—it is therefore considered by the court, that said application to set aside the probate of said will be refused; and upon the application of said petitioner for the revocation of letters of administration granted to said George N. Traywick, it is considered by the court, that said application be also refused, because said petitioner has stood by, and assented to the action of said administrator, and purchased property, and has waited an unreasonable time for making said application; no evidence appearing that there had been a mal-administration of said estate in the hands of said administrator, and it appearing that said administrator was a brother-in-law of said decedent."

The decree of the court dismissing the petition, and the other rulings to which exceptions were reserved by the petitioner, are now assigned as error.

W. C. OATES, for the appellant.

MARTIN & SAYRE, *contra*.

JUDGE, J.—This case was before this court, at the June term, 1866, and was then, necessarily, considered and determined upon the allegations of the petition alone. Now, it is presented in a different aspect, the record showing that the decision of the court below was based upon evidence, which is fully exhibited.

It is the well-settled law of this State, that when a will is admitted to probate, without notice having been given to those who are entitled to notice, the probate will be set aside, on their application to the court. Was the appellant in this case, as one of the heirs of George Sowell, deceased, notified, as the law directs, of the application to admit to probate the will of the latter? The appellant was in the military service of the Confederate States, at the time of the application. A statute was of force at that date, which provided, that all persons absent from the State, in the army of the Confederate States, might be made parties by courts of probate, in all applications to probate wills, and for the granting of letters of administration, by publication in a newspaper, as in cases of non-residents.—Acts, 1862, p. 72. On the application for the probate of this will, the court ordered, that the appellant, together with the other heirs of the decedent, have due notice of the application, and of the day set for the hearing, “as the law directs”; and in the proceedings of the court admitting the will to probate it is recited, that notice had been given to the appellant, and to the other heirs, of the application, and of the time appointed for hearing the same, “in pursuance of law, and in strict accordance with the former order of the court.” No evidence was adduced by the appellant on the hearing of his petition in this case, controverting the truth of these recitals of the record; and in the absence of evidence showing their incorrectness, they are conclusive against him. The probate court has original, general, and unlimited jurisdiction over the probate of wills; and every reasonable intendment will be made to sustain its decrees, entered in the exercise of such jurisdiction.—*McGrews v. McGrews*, 1 Stew. & Por. 30; *Apperson v. Cottrell*, 3 Por. 51; *Johnson v. Glasscock*, 2 Ala. 218; *Ikelheimer v. Chapman*, 32 Ala. 676; *Gray's Adm'r v. Cruise*, 36 Ala. 559. It re-

sults, that the court below did not err, in refusing to set aside the probate of the will.

2. The appellant prays in his petition, not only that the probate of the will may be set aside, but that the appellee may be compelled "to deliver up his letters of administration for cancellation and repeal"; and it is contended, that the court below should, at least, have revoked the letters of administration granted to the appellee, because they had been prematurely granted. If the petition, as it stands, will authorize the presentation of this as a distinct question; still, it is a sufficient answer to it to say, that no person named as executor in the will applied for letters testamentary within thirty days of the probate thereof, (Code, § 1663,) and that no person, entitled to letters of administration with the will annexed, on such failure, made application for the same within the time prescribed by the Code; and hence, under the previous adjudications of this court, all such persons must be held to have relinquished their right to the administration.—*Curtis v. Williams*, 33 Ala. 570; *Forrester v. Forrester's Adm'rs*, 37 Ala. 398. Whether or not the letters to appellee were prematurely or improvidently issued, or whether the court should not, under the circumstances, have appointed a special, instead of a general administrator, are questions which the appellant is not in a situation to raise.

Let the judgment of the probate court be affirmed.

HARRIS' HEIRS vs. HARRIS' ADM'R.

[MOTION TO DISMISS APPEAL, &C.]

1. *Certificate to transcript; by whom given.*—When the final certificate, appended to a transcript, purports to be signed by the probate judge of the county, the transcript will not be struck from the files on motion, on the ground that the officer giving it is not in fact the probate judge; the right to an office cannot be determined on such a motion.

2. *Citation; form, service, and return of.* A citation on appeal (Code, § 3018) may be in the form of a notice, addressed to the appellee, and must be executed by the sheriff, and returned by him to the officer by whom it was issued; and the original citation, with the return of service endorsed thereon, may be forwarded to the appellate court, with the transcript, though the better practice is to copy it into the transcript, (Code, § 3022,) as a part of the "proceedings in the cause."

APPEAL from the Probate Court of Sumter.

IN the matter of the final settlement of the accounts and vouchers of Socrates Parker, as administrator of the estate of Henry H. Harris, deceased. Letters of administration on said decedent's estate were granted to said Parker, by said probate court of Sumter, on the 13th October, 1862; and the settlement was made on the 8th October, 1866. On the settlement, numerous exceptions were reserved to the rulings of the probate court, both by the widow, and by the infant distributees; by whom the appeal was sued out, and errors assigned jointly and severally. The appeal was sued out on the 19th October, 1866, returnable to the January term, 1867; but, a complete transcript not having been filed, the court awarded a *certiorari*, on motion, to perfect it. The bill of exceptions, the certificate to the first transcript, and the citation to the appellee, were signed by George B. Saunders as probate judge; while the final certificate to the transcript returned in obedience to the *certiorari*, which was dated the 28th May, 1867, purported to be signed by "James A. Abrahams, judge of the probate court of Sumter county." The first transcript contained a copy of the citation to the appellees, (which was in the form of a notice, addressed to them or their attorneys,) with the sheriff's endorsements thereon; while the original citation, with its endorsements, was made a part of the return to the *certiorari*.

On these facts, the appellee moved, at this term—1st, to strike from the file the transcript returned in answer to the *certiorari*, "because said Abrahams is not, and was not at the time of signing the certificate, the judge of said probate court; and because said certificate is not according to law; and because said transcript was not filed within the

time prescribed by law. And in this connection, he moves—2d, that the former order of this court, made the 13th February, 1867," (docketing the cause, and ordering a *certiorari*,) "be set aside, and dismissed; also, (3d,) to dismiss the appeal, on the ground that no citation, such as is required by law, was issued and served, and because the appeal was not prosecuted to the return term."

W. M. BROOKS, and THOS. B. WETMORE, for the motion.
RICE, SEMPLE & GOMDTHWAITE, *contra*.

PER CURIAM.—A motion is made in this case, "to strike from the file the transcript, the certificate to which is signed James A. Abrahams, judge of the probate court of Sumter county, on the ground that said Abrahams is not, and was not at the time of signing the certificate, judge of said probate court." This motion is overruled. One sufficient reason for overruling it is, that the right to the office cannot be determined on this motion, and that we must recognize as valid the certificate of the acting judge. *Spradling v. State*, 17 Ala. 440; *Sprowl v. Lawrence*, 33 Ala. 674; *Heath v. State*, 36 Ala. 273; *Garner v. Clay*, 1 Stewart, 182; *Mayo v. Stoneum*, 2 Ala. 390; *Bondurant v. Buford*, 1 Ala. 359; *Flournoy v. Clements*, 7 Ala. 535; *Cuthbert v. Huggins*, 21 Ala. 349.

2. A motion is made to dismiss the appeal, because the citation is not conformable to the statute. We would not dismiss an appeal, on account of the absence or illegality of a citation. But we deem it proper to pass upon the sufficiency of the citation. The citation is in the form of a notice, addressed to the appellees, and is certainly not objectionable on that account; for such a notice is within the definition of a citation. It is contended, however, that the citation is required to be *made* returnable to the supreme court, by section 3018. The object of that section, in declaring that the citation should be returnable to the supreme court, was not to require that the sheriff serving it should be commanded to make return of it to the supreme court. Section 3022 shows, that the sheriff must return it to the officer issuing it, who is required to com-

municate the citation to the supreme court. No other view of sections 3018 and 3022 would make them harmonious. The object of section 3018 was, simply to indicate that the citation was legally possessed of the quality of being transmissible or returnable to the supreme court, and of becoming evidence to that tribunal of the notification of the appellees. The form of the citation, it may be remarked, has the sanction of long usage. Section 3022 is awkwardly expressed, and somewhat confused; but we understand it to authorize the inclusion of a copy of the citation in the transcript, and to make the certificate, that the transcript is a complete transcript of all the proceedings in the cause, evidence to this court of the citation as copied. The citation, and its service, are included by the phrase "proceedings in the cause," within the meaning of that phrase in section 3022. While a copy of the citation may be embraced in the transcript, nevertheless the original may be transmitted to this court; for, by section 3018, it is made returnable to this court. With this view of the two sections of the Code above noticed, we have recently adopted a rule of practice, requiring the original citation to be sent to this court, if it is not attainable for insertion in the transcript. It is of great importance that the citation and its service should, when practicable, be inserted in the transcript; for, as we have no final record, there would be no evidence of the service, except on detached paper, unless the citation and the return of service are copied in the transcript.

The motion is overruled.

BRIDGES *vs.* CRIBBS.

[MOTION TO SET ASIDE SHERIFF'S SALE.]

1. *Construction of bill of exceptions.*—A recital in the bill of exceptions, that,

“upon the foregoing testimony, the court decided,” &c., is not sufficient to show that the testimony set out therein is all the evidence that was before the primary court.—(JUDGE, J., dissenting.)

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. JOHN HENDERSON.

THIS was a motion by Philander A. Cribbs, and Massengale & Cribbs, defendants in execution, to set aside the sale of lands by the sheriff, under sundry executions against them. The sheriff who made the sale, the purchaser at the sale, (Oliver W. Bridges,) and the several plaintiffs in execution, were made defendants to the motion; but the real controversy was between John Glasscock, who was the owner by assignment of some of the executions, and who had purchased the interest of said Massengale & Cribbs in the said lands, and said Oliver W. Bridges, the purchaser at the sale. The opinion of this court renders it unnecessary to state the facts of the case at length.

W. MOODY, for the appellant.

WOOD & COOK, *contra*.

BYRD, J.—The bill of exceptions does not show that all the evidence introduced on the hearing of the motion is set out; nor can we say, from the judgment-entry made by the court, that all the evidence is set out in the bill of exceptions.—*Southern Mutual Ins. Co. v. Holcombe*, 35 Ala. 327; *Henley v. Lee*, at January term, 1867; *Kirksey v. Hardaway*, at present term. The bill of exceptions states, that, “on the foregoing testimony, the court set aside the sale.” This is not a sufficient averment that all the evidence introduced on the hearing of the motion is set out. The words, “on the foregoing testimony,” are not conclusive against the party excepting. If the decree of the court showed, or if it appeared otherwise from the record, that all the evidence was set out, it would be sufficient, although the bill of exceptions stated that the court decided upon “the foregoing testimony.”

This construction of the bill of exceptions, we admit, is

rigid and stringent; and we would take a more liberal one, if the question was *res integra*. But, to do so, we would have to overrule the case of *The Southern Mutual Ins. Co. v. Holcombe*, (35 Ala. 327,) and some of the cases cited therein, and others since decided; and this we are not prepared to do, on a question of practice so long established by the decisions of this court.—*Bradley v. Address*, 30 Ala. Rep. 80.

A bill of exceptions is construed more strongly against the exceptant; and we can not regard the assertion made in this bill as an affirmation that all the evidence introduced on the hearing of the motion is set out therein. The party excepting must affirmatively show error, to entitle himself to a reversal of the action of the inferior court.—*McReynolds v. Jones*, 30 Ala. 101; *School Commissioners v. Goodwin*, 30 Ala. 242.

The judgment is affirmed.

JUDGE, J. dissenting, referred to his dissenting opinion in *Kirksey v. Hardaway*, at the present term, as showing his views on the proper construction of the bill of exceptions.

CALHOUN vs. CALHOUN.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Liability of guardian for compound interest.*—A guardian is not chargeable with compound interest, on settlement of his accounts, unless he has been guilty of such gross neglect as is evidence of fraud; and the mere failure to make annual settlements is not such gross neglect.
2. *Allowance to guardian for necessary expenses of ward.*—Where the annual income of the ward's property, or the legal interest on the money which comprises her estate, is not sufficient for her support and maintenance, the guardian may nevertheless expend a reasonable sum for her support and education; and if the charges for those items are necessary and reasonable, such as a court of chancery would sanction, he should be allowed a credit for them on settlement in the probate court.

3. *Set-off for ward's services to guardian, and burden of proof as to value thereof.*—If the ward renders valuable services to the guardian, while residing with him, she is entitled to set-off the value of those services, against his charge for board; but the *onus* of proof as to the value of such services is on the ward.

APPEAL from the Probate Court of Russell.

IN the matter of the final settlement of the accounts and vouchers of Elisha Calhoun, as guardian of Eliza Calhoun. The guardian's accounts were filed for settlement on the 16th August, 1866, and the settlement was made on the 8th October following. The ward's estate consisted of her distributive share of the estate of her deceased father, Ezekiel Calhoun, and amounted to three hundred and eleven 03-100 dollars; for which a decree was rendered by said probate court, in favor of said Elisha Calhoun, as her guardian, against said Calhoun and Ralph O. Howard, as the administrators of the estate of said Ezekiel Calhoun, on final settlement of their accounts, on the 12th July, 1852. In the guardian's account, as stated by himself, and allowed by the court, he charged himself with debits amounting to \$508.59, and claimed credits amounting to \$1,004.87. The debits were—1st, a balance of \$293, "due as per last return, October, 1860"; and, 2d, the sum of \$65, "for services of ward in 1864"; and interest was charged on each of these items up to the day of the settlement. The first item specified on the credit side of the account was \$61.58, "for board paid Mrs. Renfroe, as per voucher No. 1"; which voucher was a receipt, signed by Mrs. R. Renfroe, in these words: "Received of Elisha Calhoun, for board of Eliza Calhoun, one hundred pounds of bacon and lard, twenty bushels of corn, and twenty dollars in Confederate money; said articles furnished to me by said Elisha Calhoun, in the year 1863, in payment of her board at my house in that year, from 1st March, 1863, to 1st January, 1864, and interest." The second voucher was an account against the ward, in favor of the guardian, for various articles, such as shoes, calico, muslin, &c., furnished to her during the years 1860, 1861, 1862, and 1863, amounting to \$57.40; and board and washing, at fifteen dollars per month, from 1860 to

1864, amounting to \$670 ; and interest on these sums, \$167, was also claimed and allowed ; making the whole amount of the credit, under voucher No. 2, \$894.40. The other credits claimed and allowed were—an attorney's fee, for services rendered on the final settlement, \$10 ; "commissions on \$215.59 received, \$5.40" ; "commissions on \$965.98 disbursed, \$24.12" ; and costs paid on settlement, \$9.37. "The ward contested and objected to each and every voucher, and demanded strict proof ; and moved to charge the guardian with five hundred dollars, or other large sum, in addition to what he had charged himself with ; also, to charge him with compound interest ; also, to charge him with a large amount of profits, to-wit, five hundred dollars, alleged to have been made by him by lending out his ward's funds at more than legal interest."

"On the hearing," as the bill of exceptions states, "the guardian proved, by Mrs. Renfroe, who was his sister, that she received the articles mentioned in voucher No. 1 ; that the ward boarded at her house, from the 9th March, 1863, until the 1st January, 1864, under a contract with the guardian, who had agreed to pay her until she was satisfied ; that the bacon she received was worth, in Confederate money, from seventy-five cents to one dollar per pound, and the corn from three to four dollars per bushel. The guardian then offered to prove, by his own oath, all the items in voucher No. 2 which were under twenty dollars ; to which the ward objected, and, her objection being overruled, she excepted. The guardian, then being sworn, stated, that he knew, of his own knowledge, that each item in said voucher was correct. On cross-examination he stated, that he did not recollect paying the money and purchasing any one article in said voucher—that he sent the money to buy the articles, sometimes by one person, and sometimes by another, and set down what they reported they paid for the things ; that he could not recollect any of these items, but was satisfied they were correct, because said voucher was a copy of his memorandum, made about the time the things were bought ; that he did not know why he had not charged the items bought in 1860 in his return of 1861 ; that if any item, not charged in annual settlement in Feb-

ruary, 1861, was charged in present account, he did not remember the reason therefor; that it might have been because the account had not been presented, or not paid; that he did not know whether he intended to give it to his ward, or not; that he would have filed a different account, if she had behaved well; that he did not recollect having ever told any one that he would give her anything; that what he would do for her depended on her conduct; that her conduct did not suit him, and he sent her to another house to board. The ward then asked the court to exclude all the guardian's testimony about said items; which motion being overruled by the court, the ward excepted. Richard Pitts, a witness for the guardian, testified, that board was worth twelve dollars and a half per month, excluding any service of the ward, and fifteen if washing was included; and that the ward was now about twenty-three years old. One Stratford, a witness for the guardian, testified, that on a Sunday morning, two or three months ago, he went with said guardian, as a witness, to the house where the ward was staying, and remained there an hour or two; that the guardian then asked her for her account for services rendered while at his house; that the ward then told him what services she had rendered; that the guardian took them down, and admitted their correctness. On cross-examination he said, that he did not know the amount of the ward's account; that she had no notice they were coming to get her admissions, and no time to make out her account, except the hour they remained.

"The guardian having here rested his case, the ward introduced the following decrees"—namely, the decree against the administrators of her father's estate, for her distributive share, which is mentioned above; and the several partial accounts filed by the guardian, the dates of which were as follows: January 3, 1855; March 27, 1856; October 1, 1857; October 1, 1858; and October 1, 1860. Each of these accounts was sworn to by the guardian, but no decree seems to have been rendered on them. In each of them, the guardian charged himself with the balance found against him by the last preceding account, with interest, and credited himself with some small sums paid out;

the balance against him, as shown by the last account being \$293. "The ward then examined the guardian as a witness, who stated, that he had never collected the decree against himself and R. O. Howard, above set out; that he could have done so at any time; that he had money on hand every fall; that he settled with said Howard, his co-administrator, by receiving notes due to the estate of said Ezekiel Calhoun, one on said Howard, and another on Renfroe, making them payable to himself individually; that he considered these notes as his own, and held himself responsible to his ward in money, and had so charged himself, under oath, in said annual settlements; that he only made simple interest on these notes, and did not consider that his duty to his ward required him to collect them. The ward asked, what he did with the money he owed her; to which he replied, that he had that safe—that he had the notes of said Howard and Renfroe, which he considered his own, and had charged himself with what he owed his ward, but had never separated what he had charged himself with from his own money; that he never loaned out any money in the name of his ward, or for his ward; that he did what he pleased with his own money, and loaned it out at whatever rate of interest he could get for it. The ward then asked him, what rate of interest he got for his own money, thus mixed with his ward's funds; and whether or not he had made more than eight per cent. on his own money during the time of his guardianship. To each of these questions the guardian objected, and the court sustained his objections; to which the said ward excepted. The ward then moved the court to reject each and every item of said voucher No. 2, separately—1st, because the articles show on their face that they were not proper to be purchased by the guardian, on account of the amount of property owned by the ward; 2d, because they were not proved; and, 3d, to the items for board, because the guardian had shown that the ward had rendered services, and had not shown what the board was worth after giving credit for the services. The guardian inserted in the account, and charged himself, at the instance of the court, with the sum of sixty-five dollars, for the ward's services; and the court having refused

to reject any of the items, the ward thereupon excepted.

"The above being all the evidence," the court rendered a decree, allowing the guardian's account as stated; which decree, with the several rulings of the court to which exceptions were reserved by the ward, is now assigned as error.

G. D. & G. W. HOOPER, for appellant.

JUDGE, J.—One question made in this case is, that the guardian should have been charged on the settlement with compound interest. The law, as settled in this State, is, that a guardian is not liable to be charged with compound interest, unless he is guilty of such gross neglect in the execution of his trust, 'as is evidence of fraud.—*Bryant v. Craig*, 12 Ala. 354. No such mismanagement, as is evidence of a corrupt intention on the part of the guardian, appears in this case. The failure to make annual settlements is not evidence of fraud, but establishes negligence merely; and the court, therefore, acted correctly in refusing to allow compound interest.—*Bryant v. Craig, supra*.

2. The estate of the ward was small—it amounted to but little over three hundred dollars, in money. The annual interest on this sum was not sufficient for her support and maintenance. If reasonable charges for boarding, clothing, and expenses incurred in educating a ward, should exceed the interest, or annual profits arising from the estate; still, if, under the circumstances, such charges were necessary, and such as a court of chancery would have decreed, they should be allowed.—*Stewart v. Lewis*, 16 Ala. 734; *Montgomery v. Givhan*, 24 Ala. 568. In this case, we can not say that the rule, as above laid down, was materially violated by the probate court, in the allowance of the items charged against the ward; and their correctness appears to have been substantially established by the evidence.

3. The ward was entitled to set off the value of the services rendered by her for the guardian, while residing with him, against the demand for board. If the amount of the credit allowed by the guardian, for these services, was insufficient, the burden of showing the insufficiency rested upon

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the ward. In the absence of definite evidence as to the character and value of the ward's services, it is impossible for us to say that the court erred in regard to the allowance for them.

We can see no reversible error in any of the rulings of the court on the settlement.

Decree affirmed.

CARTER vs. THOMPSON.

[BILL IN EQUITY BY PURCHASER, AGAINST VENDORS, TO OBTAIN LEGAL TITLE TO LAND.]

1. *Waiver of objections to appeal, &c., by joinder in error.*—Where an appeal from a decree in chancery is sued out in the name of one of the defendants only, and errors are assigned in the names of all the defendants, a joinder in error is a waiver of all objections that might be raised, either to the appeal, or to the assignments of error.
2. *Conditional dismissal of cross bill.*—A decree of the chancellor, on final hearing, ordering a cross bill to be dismissed, unless the complainant therein made a specified amendment within a given time, operates as a dismissal of the cross bill, unless the prescribed terms are complied with; and a subsequent order of the register, dismissing the cross bill on account of the failure to comply with the prescribed conditions, if assignable as error on appeal from the final decree, is, at most, error without injury.
3. *Variance.*—Under a bill for a specific performance, or in the nature of a bill for a specific performance, a variance between the allegations and the proof, in the description of the land which is the subject of the suit, is fatal to any relief.
4. *Averment of performance by purchaser, in bill for specific performance.*—A purchaser, seeking a specific performance by his vendor, or other relief in the nature of a specific performance, must aver in his bill that he has requested his vendor to make title according to the condition of his bond, or must show some excuse for his failure to do so; and an averment of the vendor's insolvency is not sufficient to excuse the failure to make such request.
5. *Parties to bill for specific performance.*—A bill which is filed by a purchaser, against his vendor and another, to compel the specific performance of a contract for the sale of lands, and which shows on its face

that the vendor derived title under a sale made by himself, as trustee, under a deed of trust executed by his co-defendant to secure a specified debt, must aver that the secured debt has been paid, or must make the owner of that debt a party; but, if the bill only seeks to divest out of the vendor such title as he acquired by his purchase at the sale, the creditor is not a necessary party.

6. *Note of evidence.*—Where the record does not contain any note of the evidence offered on the hearing, it is a grave question whether the appellate court can properly review the chancellor's decree on the pleadings and proof.
7. *Purchase by trustee at his own sale.*—A trustee, under a deed of trust for the benefit of creditors, may become the purchaser at his own sale; but such purchase and sale may be set aside, on the timely application of the beneficiaries in the deed.

APPEAL from the Chancery Court of Morgan.

Heard before the Hon. JOHN FOSTER.

THE original bill in this case was filed, on the 6th April, 1857, by Edward N. Thompson, against Charles S. England and Jesse A. Carter; and sought to divest out of the defendants the legal title to a certain tract of land, which was in the possession of said Jesse Carter, and which he had conveyed, by deed of trust, dated the 18th January, 1845, to James B. Graham as trustee, to secure the payment of three promissory notes, due to David G. Ligon, since deceased; and which was purchased by the complainant, on the 15th July, 1854, from said Charles S. England, who, having been appointed trustee under the deed, by the register in chancery, on the 15th May, 1854, in place of the former trustee, who had died, sold the land, under the power conferred by the deed, in June, 1854, and became the purchaser at his own sale. The deed of trust from Carter to Graham, which was made an exhibit to the bill, described the land as "the north-west, south-west, and south-east quarters of section nineteen, in township six, range four west;" while the title-bond from England to Thompson, which was also made an exhibit to the bill, described it as "the north-east, the south-east, and the south-west quarters of" said section, and contained the following condition: "And the said Charles S. England binds himself, his heirs, &c., that when requested by the said Edward N. Thompson, or his legal representatives, he will make to the said

Thompson, or his legal representatives, a good and sufficient title to the lands above described, except the *north-east* quarter of said section, *as that*, so soon as the title to the north-east quarter of said section, as above described, can be practicably obtained from David G. Ligon, who is bound to convey the title to the said Charles S. England." The bill alleged, "that by the said sale," under the provisions of the deed, "the said debts, with all costs attending the said deed, were extinguished;" that Carter continued in possession of the land, notwithstanding the sale under the deed; that England became insolvent, and was insolvent when the bill was filed, and had never made to complainant "a deed to said lands, nor procured from said Ligon a title to said north-east quarter of said section;" that said Carter, after being notified of the complainant's purchase from England, and of England's insolvency, by some fraudulent combination with said England, pretended to have redeemed the land under the statute, and claimed to hold it under such pretended redemption; that the complainant had never paid his note given to said England for a part of the purchase-money, but had always been ready and willing to pay it, "whenever said England was able and ready to make him a title to said lands;" and that he brought the money into court, and offered to pay it, "whenever said England will procure title for said *north-west* quarter, and make him a good title to said lands." The prayer of the bill was, that all the right and title to said lands, which was vested in Carter and England, might be divested out of them, and vested in the complainant; or that the lands might be charged with the re-payment of the purchase-money which the complainant had advanced to England; and for other and further relief, according to the nature of the complainant's case.

A decree *pro confesso*, on personal service, was regularly entered against England. Carter filed an answer, in which he set up several grounds of defense; averring that England's appointment as trustee under the deed was null and void, and that his sale of the land under the deed, his purchase at that sale, and his subsequent sale to the complainant, were invalid, and without authority. He incorporated

in his answer a demurrer to the bill, and specified ten grounds of demurrer, among which were the following: "4th, because the bill does not show that England paid said debt to Ligon, nor that the same has been paid, and it should make the owner of that debt a party to these proceedings;" "9th, because the bill shows that the complainant has a plain, adequate, and complete remedy at law: it does not show a refusal by England to make complainant a title to said lands, nor any attempt by him to obtain the same, and insists that England has the legal title, and is bound to convey it to complainant; which gives complainant an unobstructed remedy at law, which he has not attempted to assert." Carter also filed a cross bill, in which he prayed that England's sale under the deed, his purchase at that sale, and his subsequent sale to the complainant, might each be set aside and vacated. A decree *pro confesso*, on publication, was entered against England on the cross bill. An answer was filed by Thompson, in which he insisted on the validity of England's appointment as trustee under the deed, and of the sales made by England.

The chancellor overruled the demurrer to the bill, and, on final hearing on pleadings and proof, rendered the following decree: "It is therefore ordered, adjudged, and decreed, that upon the complainant's paying into court the sum of two hundred and seventy-five dollars, with interest from the 16th July, 1854, then all the right, title, and interest, legal and equitable, of both the defendants to the original bill, in and to the *north-west*, south-west, and south-east quarters of section nineteen, township six, range four west, be divested out of them, and vested in the complainant. It is further ordered and decreed, that if the complainant fails to pay said sum of money, within five days from the date of this decree, his bill stand dismissed out of this court. It is further ordered and decreed, that if the complainant makes said payment within the time limited by this decree, the register retain out of the same the costs of this suit, and loan out the balance, with bond and good security, until the next term of this court. It is further ordered, adjudged, and decreed, that unless the said Jesse A. Carter, the complainant in the cross bill, amends said

bill within five days from the date of this decree, so as to seek to recover the balance of said two hundred and seventy-five dollars after the payment of costs, then his cross bill stand dismissed, at his costs." This decree was rendered on the 13th June, 1860; and at rules held by the register on the 18th June, an order was entered, dismissing the cross bill, on account of Carter's failure to make the prescribed amendment.

The appeal was sued out by Carter alone, but errors were assigned by both of the defendants below, severally; the errors assigned being the overruling of the demurrer to the bill, the final decree, and the order of the register dismissing the cross bill. There was a joinder in error on the part of the appellee.

D. P. LEWIS, and S. F. Rice, for appellants.

WALKER & BRICKELL, *contra*.

BYRD, J.—1. The appeal was taken by Carter, apparently, from the decree of the court upon the original bill, and not upon the cross bill. The appeal should have been taken in the name of all the defendants to the original bill. Though the defendant England has not appealed, yet assignments of error have been made by counsel in his name; and the counsel for the appellee has joined issue thereon, without objection thereto, or to the appeal; and we must, therefore, treat any objections which could have been made, as waived, and pass upon the assignments of error made in behalf of each defendant to the bill.

2. It is unnecessary to consider the fourth assignment of error, further than to say, that we hold that the decree of the court operated as a dismissal of the cross bill, *unless* the complainant therein complied with the conditions of the decree within the time prescribed; and there is nothing upon the record which shows that he offered to comply, or did comply therewith. The order of the register, if an assignable error, was, at most, error without injury.

3. The other assignments of error may be disposed of together. The transcript has been made out defectively, or the counsel for appellee have committed several mistakes

in the bill. There is no averment that England had sold the *north-east* quarter of section nineteen to complainant. The only allusion in the bill, to that quarter, is in the statement of the contents of the bond for titles, and then only by an exception of it from the stipulation to convey title to a certain portion of land when the defendant England should be requested ; and also in averring that he had never obtained any title to the same from Ligon. This would imply that there had been a contract to convey that quarter ; but this is not equivalent to an averment of the fact. The deed of trust executed by Carter and wife, to secure the payment of the notes mentioned therein, describes the land as the north-west, south-west, and south-east quarters of section nineteen, and it is so described in the decree of the court ; but, by reference to the bond for titles, attached to the deposition of the witness Campbell, it appears that the land sold is described as the *north-east*, the south-east, and the south-west quarters of section nineteen. The bill avers, that England sold complainant the land described in the deed of trust, and executed a bond for titles to the same. This is a variance between the allegations of the bill, the proof, and the decree of the court ; which would result in a reversal of the decree of the court, if we felt authorized, from the condition of the record in other respects, to pass upon the merits of the cause upon the pleadings and proofs.

4. The bill is defective, in not averring that complainant had made a request of England to make title in conformity to the terms of the bond for titles, or some excuse for not doing so. The averments that he was insolvent, and had allowed Carter to make a *pretended* redemption of the land, and that Carter held possession of it under such pretended redemption, are not sufficient to excuse the necessity of such a request prior to filing the bill. And though complainant may only seek to divest out of the defendants such title as they may have to the lands, yet he should have made a request of them to execute a quit-claim conveyance thereto, prior to filing the bill, or should have averred some excuse for not doing so.—*Bell v. Thompson*, 34 Ala. 633. Although this objection to the bill is somewhat inartificially

raised by the ninth ground assigned in the demurrer of Carter, yet we think it sufficiently made; and, to that extent, the court should have sustained the demurrer to the bill.

5. The fourth ground would also have been well assigned, if the bill had sought a specific performance of the bond for titles; but, as it only sought a divestiture of such title as the defendants had, and did not seek to divest the rights of the holder of the notes mentioned in the deed of trust, it was properly overruled. As it seems that the notes have been paid, it would be well to amend the bill in that respect, so as to meet any objection which might be made to any relief that may be decreed under the general prayer of the bill, in case the specific prayer cannot be granted.

6. The record does not show any note of the testimony; and in its absence, it becomes a grave question, under the rule of practice, whether this court can review the decree of the court below upon the pleadings and proof. If all the evidence set out in the record was introduced on the trial, we are inclined to the opinion, that, if the bill had been amended as above indicated, and so as to conform to the testimony, the complainant would have been entitled to *some relief*. We are satisfied that in all other respects, than as above noticed, the original bill has equity. If the complainant seeks a specific performance of the bond for titles, it may be necessary to make the heirs-at-law of Ligon parties defendant to the bill, and also to amend the prayer of the bill, with such other appropriate amendments to the stating part of the bill as are indicated in this opinion, and in such other respects as may be necessary to meet the requirements of the law and the facts.

7. A trustee may purchase land at his own sale, subject to be set aside upon the timely application of the beneficiaries; and in this case it is apparent, if we look to the evidence, that Carter treated the purchase by the trustee as valid.—*Charles v. Dubose*, 29 Ala. 367.

For the error pointed out, the decree of the court is reversed, and the cause remanded.

PADGETT *vs.* PADGETT.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Competency of guardian as witness for himself.*—Prior to the passage of the act approved February 14, 1867, relative to the competency of witnesses, (Session Acts, 1866-67, p. 435,) a guardian could not testify generally for himself, on final settlement of his accounts, though he might establish by his own oath the correctness of any item under twenty dollars.

APPEAL from the Probate Court of Pike.

IN the matter of the final settlement of the accounts and vouchers of Gray Padgett, as the guardian of Eliza Padgett, a minor. On the settlement, which was made on the 7th December, 1866, several exceptions were reserved by the ward to the rulings of the court on questions of practice and evidence, and also to the final decree; and these matters are here assigned as error.

J. D. GARDNER, for appellant.

J. N. ARRINGTON, *contra*.

JUDGE, J.—At the date of the settlement by the guardian in this case, he might have established by his own oath any item in his account not exceeding twenty dollars; but it appears from the record that the court permitted him to testify generally as a witness in his own behalf. In permitting this, the court below erred. Our decision upon this point is, of course, made without reference to the act in relation to the competency of witnesses, which became a law subsequent to the date of the settlement.—Acts 1866-67, p. 435. This act may exercise an important influence over the case on another settlement.

There are other questions in the cause; but some of them are not very clearly presented by the bill of exceptions, and we decline to notice any other than the one above

designated ; for the erroneous ruling of the probate court in relation to which, the decree must be reversed, and the cause remanded.

MYERS *vs.* SEGARS.

[PETITION FOR REMOVAL OF GUARDIAN.]

1. *Waiver of objections by joinder in error.*—A motion to dismiss an appeal, on account of the failure of the clerk to certify that an appeal was taken, or that any security for the costs was given, comes too late after a joinder in error.
2. *Execution of bill of exceptions.*—Where a bill of exceptions is dated on the day on which, as it shows on its face, the cause was tried, it sufficiently appears to have been signed in term time, as required by the statute.
3. *What is revisable.*—The appellate court cannot revise the decision of the probate court on the facts of the case, unless the record sets out all the evidence that was before the probate court.

APPEAL from the Probate Court of Pike.

IN the matter of the petition of Mary J. Myers, by her next friend, for the removal of Hugh R. Segars from the guardianship of her property, on account of his failure to return an inventory of her property within the time required by law. The petition was filed on the 20th March, 1867 ; and the second Monday in April following, which was the 8th day of the month, and the first day of the regular term of the court, was appointed for the hearing ; on which day, the cause was continued until the third Monday. On the hearing, the following bill of exceptions was reserved by the ward :

“ In probate court for the county of Pike, at Troy, at an adjourned term held on the third Monday in April, 1867. Be it remembered, that on this, the 15th day of April, 1867,

the above stated case came on to be heard, upon the following petition," setting out a copy of it. "The parties appeared, by counsel, and the defendant pleaded the general issue; and upon which issue was joined. The petitioner then read to the court an order of this court, dated November 29, 1859, by which said Segars was appointed the guardian of the person and estate of said minor, and entered into bond and security for the proper discharge of his duties as such guardian; and then proved to the court, that said Segars had not returned into this court any inventory of the estate of his said ward, as required by section 2021 of the Code of Alabama, until the 14th day of October, 1861, when he made an annual settlement, as guardian as aforesaid; at which time, said Segars prayed that the account then rendered might be received and adopted as an inventory of the estate of his said ward, and which account was so received and adopted by the said court. The entire record of the court was in evidence. And this being all the testimony in the case, the petitioner, by her counsel, moved the court to remove the said Segars from said guardianship, and cause him to make final settlement of his guardianship; which the court refused to do, and dismissed the petition, at the costs of the petitioner; to which the petitioner excepted, and now assigns the ruling of the court as error, and prays that this her bill of exceptions may be signed and sealed by the court, and made part of the record; which is done, April 15, 1867."

(Signed)

D. W. SILER,

Probate Judge.

The decree dismissing the petition was the only matter assigned as error, and there was a joinder in error on the part of the appellee, who afterwards moved to dismiss the appeal, and, if that motion was overruled, to strike the bill of exceptions from the record. The cause was submitted on the merits at the same time.

W. C. OATES, for appellant.

J. D. GARDNER, *contra*.

BYRD, J.—1. The appellee moves to dismiss the appeal, on the ground that the clerk has not certified that any surety for costs of the appeal was given, or that any appeal was taken. The appellee having joined in the assignments of error, the motion must be overruled, under the authority of *Thompson v. Lee*, 28 Ala. 453.

2. The appellee also moves to strike the bill of exceptions from the record, on the ground that it does not appear to have been signed by the judge of probate in term time. We think that it sufficiently appears that the bill of exceptions was signed during the term at which the cause was tried; and the motion must be denied.

3. The bill of exceptions states, that “the entire record of the court was in evidence”; but it is not set out in this transcript. In this state of the record, we cannot say that the court erred in the decree rendered.

Affirmed.

MEAHER ET AL. vs. TINDAL.

[LIBEL IN ADMIRALTY AGAINST STEAMBOAT.]

1. *Decree against stipulators by default, not setting out evidence.*—If the stipulators neither answer nor appear, in person or by proctor, a decree *pro confesso* may be entered against them; and if the court, without formally entering such decree, proceeds to hear the cause *ex parte*, and renders a proper decree, they cannot complain on error that the record does not set out the evidence on which the decree is based.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS was a proceeding in admiralty, at the suit of James M. Tindal, against the steamboat *Waverley*. The libel was filed on the 2d June, 1866, to enforce a claim for unpaid wages due to the libellant as a pilot. The boat having

been seized by the sheriff, James M. Meaher, Thomas Swan, and C. M. Newberry, intervened as stipulators; the condition of their bond, or stipulation, being that they "shall well and truly pay and satisfy such judgment as shall be rendered on said libel." On the 16th July, 1866, the following decree was rendered in the cause: "Came the said libellant, by his proctor, and James M. Meaher, Thomas Swan, and C. M. Newberry, stipulators as herein-after mentioned for the release of the said boat, being publicly called, came not, neither in person, nor by proctor; and the proctors for the libellant moving the court for a decree; and there being no answer nor defense offered or made to said libel; and it appearing to the court, by due proof, that the sum of sixteen hundred and twenty-seven dollars became due to the said libellant, on the 1st day of June, 1866, for labor and services rendered by him, according to contract, as pilot for said boat, within the State of Alabama, and at the instance of the master of said boat; and that said debt became due, and was duly demanded, before and within six months next preceding the filing of said complaint; and it further appearing that said boat was seized, by virtue of a writ of seizure issued upon said complaint, more than twenty days previous to said term, to-wit, on the 2d day of June, 1866; and that afterwards, to-wit, on said 2d day of June, said Meaher, Swan, and Newberry entered into bond, in the sum of three thousand two hundred and fifty-four dollars, dated the 2d June, 1866, and conditioned to pay and satisfy such judgment as should be rendered on said libel, and that thereupon said boat was released from custody, as shown by the sheriff's return; wherefore, it is adjudged and decreed, that said James M. Tindal, libellant as aforesaid, do have and recover of said James M. Meaher, Thomas Swan, and C. M. Newberry, stipulators as aforesaid, the said sum of sixteen hundred and twenty-seven dollars, and the further sum of sixteen 61-100 dollars, the interest which has accrued upon said debt since the 1st day of June, 1866, together making the sum of sixteen hundred and forty-three 61-100 dollars, together with the costs which have accrued upon said libel; and that execution issue for said debt, interest, and costs,

and be made returnable to the next admiralty term of this court."

There were four assignments of error, the first and second of which were obviated by an amendment of the record, and the others were as follows: "3d, that the evidence in the cause is not set out in the record; 4th, that there is error in said decree."

THOS. H. HERNDON, for appellants.

W. BOYLES, *contra*.

JUDGE, J.—Only the third and fourth assignments of error are insisted upon by the appellants, which are—that the evidence in the cause is not set out in the second, and that there is error in the decree. It is recited in the decree, that the stipulators, "being publicly called, came not, neither in person, nor by proctor;" and it does not appear that they ever answered the libel. Being thus in contumacy and default, a decree *pro confesso* might have been taken against them.—3 Greenleaf's Ev. § 398; 2 Conkling's Adm. Pr. 177–178. If such a decree was not entered, *pro forma*, the court did in effect what it had the right to do, under the circumstances, viz., it proceeded to hear the cause *ex parte*, and to adjudge therein as it seemed to the court law and justice required.—2 Conk. Adm. Pr. 178. If evidence was taken by the court, other than such as would necessarily result from a decree *pro confesso*, it was not necessary, under the circumstances, to set it out in the record; and if it were, we would not reverse for the failure to do it, the record showing a substantial cause of action, and the question not having been raised in the court below.

There is no error in the decree, of which the appellants can complain, and it is consequently affirmed.

ALA. & MISS. RIVERS R. R. CO. *vs.* HUNGERFORD.

[MOTION TO DISMISS APPEAL, &c.]

1. *Certificate of appeal; certiorari.*—When the clerk does not certify the time when the appeal was taken, nor even the fact that any appeal at all was taken, (Code, § § 3016, 3022,) the appeal will be dismissed on motion; but, if the transcript shows that a sufficient certificate might have been made, and the cause is submitted on the merits when regularly reached on the docket, and the submission is afterwards set aside, at the instance of the appellee, in the absence of the appellant's counsel, the court will continue the motion to dismiss, and award a *certiorari*, *ex mero motu*, to perfect the certificate.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. JOHN MOORE.

PETTUS & DAWSON, for appellant.

W. M. BROOKS, *contra*.

BYRD, J.—The appellee makes a motion to dismiss the appeal, on the ground that “the clerk does not certify the time when the appeal was taken, nor the fact that any appeal was taken.” Under section 3016 and 3022 of the Code, this ground is well taken; but, as this cause was submitted on the merits, during the division to which it belonged, and the submission has since been set aside, upon a showing made by the appellee, in the absence of appellant's counsel, we think it proper to continue the motion, and award a *certiorari* to the clerk of the circuit court of Perry county, to send up a certificate in conformity to law, if he can properly do so. We make this order, as it appears from the transcript that such a certificate can be made. The certificates to transcripts are often imperfect, and sometimes totally defective, although, by a reference to the Code, it is quite easy to make a perfect one.

All the other motions made by the appellee are overruled.

Let an order be entered, continuing the motion to dismiss the appeal on the ground above stated, and that a *certiorari* issue to the clerk of the court below for a certificate in conformity to law, if one can be properly made.

HUDSPETH & CO. *vs.* DAVIS.

[PETITION FOR SUPERSEDEAS OF EXECUTION.]

1. *Constitutionality of "stay law" of 1861, prohibiting issue of executions on judgments.* The fifth section of the act approved December 10, 1861, (entitled "An act to regulate judicial proceedings," and commonly known as the "stay law,") which prohibited the issue of an execution on a judgment, without the written consent of the defendant, until the expiration of twelve months from the ratification of a treaty of peace between the United States and the Confederate States, was unconstitutional and void, whether tested by the constitution of the United States, or by that of the Confederate States.

APPEAL from the Circuit Court of Henry.

Tried before the Hon. H. D. Clayton.

THIS was a petition by Jonathan Davis, to supersede and quash an execution against him, which was founded on a judgment rendered by said circuit court, at its fall term, 1861, in favor of R. T. Hudspeth & Co.; and was issued in June, 1866. The petition for the *supersedeas* was filed on the 22d October, 1866, and alleged that the judgment had been paid and satisfied by the defendant in April, 1862. The court overruled a demurrer to the petition, and an issue was then formed as to the fact of payment *vel non*, which was submitted to a jury. On the trial of this issue, it was proved that, in November, 1861, an execution was issued on this judgment, and placed in the hands of the sheriff of the county; and that on the 27th April, 1862, while said execution was still in the hands of the sheriff, the defendant made him a payment on account of it. The sheriff's receipt, which was offered in evidence by the plaintiff in the motion, specified that the payment was made "in full of interest, commissions, and costs"; and the testimony of the sheriff, on the part of the defendants in the motion, was to the same effect; while a witness introduced by the petitioner testified, that he was present when the payment was made, and that it included the entire amount due on the judgment. "This being all the evidence in the

cause, the court thereupon charged the jury, among other things, that Davis had a right, under the law at the time of the alleged payment, to pay to the sheriff, and the sheriff had the right to receive, the full amount of said execution, and satisfy the same. The defendants excepted to this charge, and requested the court to instruct the jury—1st, that unless the evidence preponderates to show that Davis paid the full amount of said execution, and that Hudspeth & Co. received the money, or otherwise sanctioned and approved the act of the sheriff in receiving the same, they should find for the defendants; and, 2d, that under the law existing at the time of the alleged payment, the sheriff had no right to receive payment in full of said execution, unless authorized by the plaintiff therein, and that unless they believed, from the evidence, that the money was paid as alleged, and paid in pursuance of such an authorization, they must find for the defendants. The court refused these charges, and the defendants excepted to their refusal."

The overruling of a demurrer to the petition, the affirmative charge of the court, and the refusal of the charges asked, are now assigned as error.

W. C. OATES, for the appellants.

A. J. WALKER, C. J.—The fifth section of the act of 10th December, 1861, prohibited the issue of an execution, without the written consent of the defendant, until after the expiration of one year from the ratification of a treaty of peace between the Confederate States and the United States, except in certain specified cases, and under certain specified conditions. This act was void, whether tested by the constitution of the United States, or by that of the Confederate States.—*Ex parte Pollard*, 40 Ala. 77. The clerk and sheriff were certainly excusable in disregarding a law thus void; and their acts cannot be invalid, because they did disregard it. The sheriff, therefore, had authority, by virtue of the execution in his hands, to collect the full amount thereof; and having done so, such collection rendered him and his sureties liable therefor, and discharged the defendant from the judgment. Affirmed.

HAWKINS' ADM'R vs. DUMAS.

[TROVER FOR CONVERSION OF SLAVES;]

1. *Probate of will; necessity of.*—A party cannot deduce title to personal property under a will, without proof of its probate.
2. *Same; not presumed from certified copy of recorded will.*—Neither the probate of a will, nor even the death of the testator, can be presumed by the court from the certificate of the probate judge, appended to a transcript from the records of his court, to the effect “that the foregoing is a correct copy of the will now on file” in his office.
3. *Error without injury, in admission of illegal evidence.*—Where the bill of exceptions purports to set out all the evidence, and shows that the plaintiff was not entitled to recover, the admission of illegal evidence, against his objection, is, at most, error without injury.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was brought by Benjamin R. Thomas, as the administrator of Mary Hawkins, deceased, against Obadiah A. Dumas, to recover damages for the conversion of several slaves; and was commenced on the 23d day of February, 1858. The plaintiff deduced title to the slaves under a clause in the will of Azariah Dumas, deceased, (who was the father of Mrs. Mary Hawkins,) by which they were bequeathed to Wade Hampton Dumas, who was a son of said Azariah Dumas, “to have and to hold the same during his natural life, and at his death to the lawful heirs of his body; and in case of death without lawful heirs, to be equally divided between Lafayette Dumas, Wincey Autrey, and Mary Hawkins.” Wade Hampton Dumas died, intestate, in 1853, leaving a widow, but no children; and letters of administration on his estate were granted, in October, 1853, to the defendant, who afterwards suffered the slaves to be removed beyond the limits of the State by one Duncan, who had married the widow of his intestate. The bill of exceptions purports to set out all the evidence introduced on the trial, and states that, “on the trial, the plaintiff read in evidence the will of Azariah Dumas, and

probate thereof, as follows"; but the record does not show any probate of the will, though the certificate of the probate judge, appended to it, states that "the foregoing is a true and correct copy of the will now on file in my" [his] "office as the will of Azariah Dumas, deceased." The plaintiff reserved an exception to the ruling of the court in admitting, against his objection, evidence touching the value of the slaves sued for; and also to the charge to the jury, "that, if they believed the evidence, they must find for the defendant"; and these rulings of the court, in consequence of which the plaintiff was compelled to take a nonsuit, are now assigned as error.

WATTS & TROY, for appellant.

BYRD, J.—The bill of exceptions purports to set out all the evidence introduced on the trial. The appellant, not relying on previous possession, but upon title, as the ground of a recovery, introduced in evidence the will of Azariah Dumas, and attempted to show title under it. But it does not appear that the will was ever probated, as required by law, nor that Azariah Dumas is dead, unless we *were* to infer it from the certificate of the judge of probate, to the transcript introduced in evidence. The appellant cannot claim title to personal property through a will in this condition.—*Johnson v. Glasscock*, 2 Ala. 218; *Shepherd v. Nabors*, 6 Ala. 631. The court, therefore, did not err in the charge given.

3. The appellant reserved an exception upon the admissibility of evidence, touching the value of the slaves sued for. As the appellant was not, under the testimony, entitled to recover the slaves, the evidence admitted was, at most, error without injury.

The judgment of the court below is affirmed.

JUDGE, J., not sitting.

REPORTS
OF
CASES ARGUED AND DETERMINED
AT THE JANUARY TERM, 1868.

HUGGINS *vs.* THE STATE.

[INDICTMENT FOR BUYING OR RECEIVING STOLEN PROPERTY.]

1. *Sufficiency of indictment in averring guilty knowledge.*—An averment that the defendants “feloniously bought or received two horses, of the value of one hundred dollars each, the personal property of S. W., which said horses had before then been feloniously taken and carried away, and they (the said defendants) well knowing that the said horses had been feloniously taken and carried away,”—shows with sufficient certainty that the defendants had knowledge of the larceny at the time they bought or received the horses.
2. *Defendant's declarations connected with prosecution, tending to show implied admission of guilt.*—Any conduct on the part of the defendant, in reference to the prosecution pending against him, which tends to authorize the implication of an admission of guilt by him, is competent evidence against him; as where one of his bail suggested to him that he might risk a liability on his bond for six months longer, and possibly compromise it if necessary, and he replied, “Do as you see fit.”
3. *Variance; charge tending to mislead jury.*—Under an indictment for buying or receiving stolen property, (Code, § § 3178, 3182; Revised Code, § 3710,) a conviction cannot be had on proof of concealing, or aiding in the concealment of the property; yet the court may properly refuse to instruct the jury, at the instance of the defendant, “that although he may have concealed, or aided in the concealment of the property, knowing it to have been stolen, they cannot find him guilty as charged in the indictment,” since such charge does not negative the buying or receiving.
4. *Buying or receiving stolen property; constituents of offense.*—The offense of buying or receiving stolen property, knowing it to have been stolen,

(Code, § § 3178, 3182 ; Revised Code, § 3710,) may be consummated through the instrumentality of others, without seeing the property.

5. *Proof of venue.*—The appellate court will not pass on the sufficiency of the proof of venue in a criminal case, where no question was raised in the court below in reference to it.

FROM the Circuit Court of Dale.

Tried before the Hon. H. D. CLAYTON.

THE indictment in this case was found at the April term of said court, 1866, and charged that, before the finding thereof, "John Huggins and Columbus Huggins feloniously bought or received two horses, of the value of one hundred dollars each, the personal property of Samuel Watford, which said horses had before then been feloniously taken and carried away, and they (the said John Huggins and Columbus Huggins) well knowing that the said horses had been feloniously taken and carried away ; against the peace and dignity," &c. John Huggins was tried, alone, at the December term, 1867, and pleaded not guilty ; and on the trial he reserved the following bill of exceptions :

"The State introduced Samuel Watford as a witness, who testified, that on the night of the 3d January, 1866, two horses belonging to him, of the value of about two hundred and fifty dollars, were stolen from his lot in said county ; that one of said horses was 'pigeon-toed,' and the other had a very large foot, and one of them was old, and 'stemmed' his fodder ; that he found the tracks of the horses on the next morning, leading in the direction of Newton, Alabama ; that he followed the tracks to within five or six miles of Ozark, and could track them no further ; that he found, about nine days afterwards, in the woods, near the head of a branch within four or five hundred yards of the defendant's house, a tramping-place where horses had been tied and fed, and a beaten trail leading from it to the branch, and another trail leading in the direction of the defendant's house ; that one of the horses fed there 'stemmed' his fodder ; that the tracks of one of them, at the feeding-place, and along said trails, were 'pigeon-toed,' and the other's were very large, and that both were about the size of the tracks of his lost horses ; that he travelled

the path leading in the direction of the defendant's house but a short distance, and did not know whether or not it led as far as his house; that the horses appeared to have been ridden or led back and forth along said path; that while he was at the place that morning, he saw a man pass near by, going through the woods, in a direction down the branch, having a coat or blanket under his arm, and recognized him as the defendant. Said witness further testified, that one M. H. Daughtry, one of the defendant's bondsmen, upon a compromise of his forfeited bond as the defendant's surety, had given him a note in satisfaction for the loss of his horses. The State then introduced said Daughtry as a witness, who testified, that he became surety for the defendant's appearance after his commitment by a justice of the peace, and had a mortgage on the defendant's land to indemnify himself against liability on the bond, that a forfeiture was entered against the defendant and his bondsmen, at the spring term of said court, 1866; that some ten days before the fall term, 1866, he saw the defendant, who came to him in his plantation, and who had previously moved to Florida; that after talking about the bond, indictment, &c., the defendant went away, and said he would be back in a few days; that he returned a few days afterwards, and they renewed their conversation on the same subject; that he then told the defendant, 'he thought there was no immediate danger of a liability accruing upon the bond—that it might be risked six months longer, and, if it should become necessary, he thought it could be compromised'; and that the defendant replied, 'Do as you see fit,' or words to that effect. The defendant moved the court to rule out all the evidence relative to the bond and the compromise thereof, and the note given to Watford by Daughtry in satisfaction for the horses lost; which motion the court overruled, and the defendant excepted.

"The State then introduced one Bracken as a witness, who testified, that the said tramping-ground was near the defendant's house; that there was but little difference between the distance from it to the defendant's house, and other houses in the vicinity; that he had stepped the dis-

tance between it and a road, which ran between it and the defendant's house, and found it to be one hundred and fifty-five paces, and the distance from said road to the defendant's house was two hundred and eighty-seven paces; that he saw at said tramping-place a small trough, in which horses had been fed, and, near by, evidences of two persons having lain in the straw; that he saw horses' tracks going in the direction of the defendant's house, along a sort of dull path which led towards the house, and that the tracks had been made since the fall of any rain. The State then introduced one Clark as a witness, who testified, that he saw the place, and that the appearances thereabouts were very much the same as those described by the other witnesses; also, that the defendant left the country some time after the commencement of this prosecution, and was not afterwards openly seen in the county; that, having afterwards ascertained that he was in the country, he (witness) notified the sheriff of the fact, and went with him, and assisted in arresting the defendant; that M. H. Daughtry lived at the defendant's late residence, where the defendant was seen the day before his arrest; that they went to arrest him in the night, and found him in a house; and that he thought, from the noise made in the house by the defendant, that he was trying to escape from the sheriff. J. L. Williams was then introduced by the State, and testified, that he was the sheriff of the county; that he went to the house of one Nathan Mims, on the notice given to him by said Clark, and there arrested the defendant near midnight; that the defendant tried to avoid arrest, by going first to the back door, but, finding some one there, came to the front door, where witness met and arrested him; and that the defendant said, after having been arrested, that he would have escaped if he could. One Windham, a witness for the defendant, testified, that he, with some others, at the defendant's request, examined the feeding-place, and saw the trail leading in the direction of the branch, and also saw a blind trail, resembling a pig's trail, leading in the direction of the defendant's house, but did not see any horses' tracks on said path; that from appearances, several days had elapsed since horses had been fed there; and that

they followed the trail in the direction of the defendant's house not more than thirty or forty yards.

"This being all the evidence in the case, the defendant asked the court to instruct the jury—1st, 'that unless they believed from the evidence, beyond all reasonable doubt, that the defendant bought or received the horses, knowing at the time that they were stolen, and that when he thus received or bought them, he did it with the intent thereby to defraud the owner of said horses, they must acquit'; and, 2d, 'that although the defendant may have concealed, or aided in the concealment of said horses, knowing them to have been stolen, they cannot find him guilty as charged in the indictment.' The court gave the first charge as asked, but refused to give the second; and charged the jury, 'that although the defendant may have concealed, or aided in the concealment of said horses, knowing them to have been stolen, they cannot find him guilty as charged in the indictment, unless they also find, from the evidence, that he bought or received the horses, knowing that they were stolen, and without the intent to restore them to the owner; and that the defendant may have received the horses, if he took the direction and control of them, although other persons may have been there with them. To the refusal to charge as asked, and to the charge given, the defendant excepted. The court then charged the jury, at the request of the solicitor, that the defendant may have received the horses without ever having seen them; to which charge, also, the defendant excepted."

RICE, SEMPLE & GOLDTHWAITE, for the defendant.

JNO. W. A. SANFORD, Attorney-General, *contra*.

A. J. WALKER, C. J.—The indictment alleges, that the persons charged feloniously bought or received two horses, "of the value of one hundred dollars each, the personal property of Samuel Watford, which said horses had before then been feloniously taken and carried away, and they (said John Huggins and Columbus Huggins) *well knowing that the said horses had been feloniously taken and carried away.*" It is objected to this indictment, that it

does not show a knowledge of the larceny at the time of the buying or receiving. We do not think this objection is well taken. The words "well knowing," &c., obviously refer to and qualify the previous allegation, that the defendants bought or received, and declare the existence of the knowledge at the time of such buying or receiving. Any other construction would do violence to the obvious meaning of the indictment.

2. The defendant made a comprehensive motion to rule out all the evidence relative to his bail-bond, and the compromise thereof, and a note given by the defendant's bail to Watford, in satisfaction for the horses lost. Certainly a part of this evidence was legal, and the court committed no reversible error in overruling the motion, notwithstanding the rest of the evidence may have been inadmissible. The evidence disclosed that a suggestion was made to the defendant, that the accruing of a liability upon the bail-bond might be risked for six months longer, and that, if necessary, it might be compromised; and that the defendant replied to the suggestion, "Do as you see fit." The admissibility of this evidence is referrible to the doctrine, that the conduct of the accused, in reference to the prosecution, tending to authorize the implication of an admission, is competent evidence against him.—*Johnson v. State*, 17 Ala. 618; *Martin & Flinn v. The State*, 28 Ala. 71.

3. The court below refused to give the charge asked by the defendant, as follows: "Although the defendant may have concealed, or aided in the concealment of said horses, knowing them to have been stolen, they cannot find him guilty, as charged in the indictment." It is true that the defendant could not be convicted, in this case, for concealing, or aiding in the concealment of the stolen property; yet it might be that the defendant concealed, or aided in the concealment of the property, and also received, or bought it, knowing it to be stolen. The defendant, therefore, was not entitled to the charge, that the defendant was not guilty, notwithstanding he may have concealed, or aided in the concealment of the stolen horses. The explanatory charge given by the court, of its own motion, was unobjectionable.

4. The charge given at the instance of the solicitor, to the effect that the defendant might commit the offense without seeing the property, was obviously correct. The defendant could certainly be guilty of committing the felony charged, through the instrumentality of others, without performing the act of receiving or buying in person, or actually seeing the property.

5. There was evidence in the court below reasonably conducing to prove the venue. We do not understand the decision in *Frank v. State*, (39 Ala. 670,) as going to the extent of holding that this court will pass upon the sufficiency of the evidence of venue, when no question was raised in the court below. That decision pertains to a case where it affirmatively appeared that there was no proof tending to show venue, and to such cases its authority and reasoning must be confined.

Affirmed.

KAVANAUGH vs. THE STATE.

[INDICTMENT AGAINST SHERIFF'S DEPUTY FOR ESCAPE.]

1. *Special deputy of sheriff is mere agent, and not officer.*—A special deputy, "employed in particular cases" by a sheriff, is the mere agent of his principal in the particular case, and is not an officer within the meaning of the term as used in the constitution.
2. *Voluntary escape; sufficiency of indictment for.*—An indictment for a voluntary escape, (Penal Code, § 28; Revised Code, § 3569,) which conforms substantially to the form prescribed by the statute, (No. 46,) is sufficiently definite and certain to authorize a conviction for a voluntary escape, whether the defendant be an officer or not.
3. *Same; conviction of less offense than charged.*—Under an indictment against an officer, for a voluntary escape, a conviction may be had for a negligent escape, (Penal Code, § 647; Revised Code, § 4199,) because the greater offense includes the less; but, whether a conviction can be had on proof of a voluntary escape, under an indictment which charges a negligent escape, as was held in *Nall v. The State*, (34 Ala. Rep. 262,) *quære?*

4. *Same ; same.*—Although a special deputy, “employed in a particular case” by a sheriff, is not an officer within the meaning of the constitution, or of section 29 of the Penal Code, (Revised Code, § 3570,) which relates to negligent escapes by officers; yet, at common law, if he had the legal custody of a person who was charged with an indictable offense, and negligently suffered such person to escape, he might be indicted and convicted for a negligent escape; and under the provisions of the Penal Code, (§§ 28-9, 210, 570; Revised Code, §§ 3569-70, 3757, 4120.) if the indictment charges that he had the legal custody of a person charged with an indictable offense, and voluntarily suffered such person to escape, he may be convicted of a negligent escape, and fined any sum not exceeding five hundred dollars, as prescribed by section 207 of the Penal Code.

FROM the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

THE indictment in this case was returned into court on the 16th February, 1867, and was as follows: “The grand jury of said county charge, that, before the finding of this indictment, Frank Kavanaugh, having then and there been specially deputized by Augustus H. Johnson, sheriff of the county and State aforesaid, to hold in custody one Milton Malone, the said Malone being then and there charged with an indictable offense, to-wit, assault with intent to murder, and having then and there the legal custody of said Milton Malone, voluntarily permitted the said Milton Malone to escape; against the peace,” &c. The defendant pleaded not guilty, and issue was joined on that plea. The jury returned a verdict, finding the defendant guilty of a negligent escape, and assessing a fine of two hundred dollars against him; and the court rendered judgment accordingly. There is no bill of exceptions in the record, and no writ of error; but the judgment-entry recites, that the defendant took an appeal.

ELMORE, KEYES & MORRISSETT, for the defendant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

* BYRD, J.—By section 689 of the Code, a sheriff is authorized to appoint “as many deputies as he thinks proper”; and by section 116, such deputy, “before he proceeds to act, must take the oath prescribed by the sixth section of

the seventh article of the constitution"; but a deputy "employed in particular cases" is not required to take such oath. The section of the constitution referred to is as follows: "All civil officers of this State, legislative, executive, and judicial, before they enter upon the execution of the duties of their respective offices, shall take the following oath; 'I solemnly swear,' (or affirm, as the case may be,) 'that I will support the constitution of the United States, and the constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully discharge, to the best of my abilities, the duties of the office of ———. So help me God.'" This clearly indicates, that the legislative department of the government did not consider or treat a special deputy of a sheriff as an officer. And such a deputy is not an officer, under any constitutional provision. The legislature is incompetent to relieve any civil officer from taking the oath prescribed by the constitution. Its mandate is positive, and beyond the pale of legislative enactments. As it *may* be in the power of the general assembly to create offices and officers not provided for in the constitution, yet they can not relieve such officers from the oath above recited; and when the legislature authorizes an officer to appoint a deputy, which, by the common law, could have been appointed by such officer, and relieves such appointee from taking the oath, it is a clear indication of the legislative will, that the appointee is not an officer, but a mere agent of the principal, for the particular case or object which occasioned the appointment.

2. The indictment in this case is founded on section 28 of the Penal Code, (Revised Code, § 3569,) which is as follows: "Any sheriff, or other officer, or person, who has the legal custody of any person charged with, or convicted of, an indictable offense, and who voluntarily permits such person to escape, must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county, not less than two, nor more than twenty years." The indictment is in substantial conformity to the provisions of the Penal Code and the form prescribed therein, (p. 212, No. 46,) and is sufficient to sustain a conviction for a *voluntary*

escape permitted by the defendant. The word "person" includes any person, whether he is an officer or not.

3. But the jury in this case found the prisoner "guilty of negligent escape." The Penal Code provides, that a "defendant may also be found guilty of any offense which is necessarily included in that with which he is charged, whether it be a felony or a misdemeanor"; and that where an indictment charges an offense of which there are different degrees, "the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto." P. 158, § 647. In *Nall v. The State*, (34 Ala. 262,) this court held, that, "under an indictment for a voluntary escape, the defendant may be convicted of a negligent escape, because the former offense includes the latter"; and the court further say: "Consequently, under an indictment against a sheriff, for a negligent escape, a conviction may be had on proof of a voluntary escape." The former extract is considered to be sound law; but, as to the latter, for myself, I desire to say that, as a voluntary escape is made by statute a felony, and a negligent escape is, by statute and common law, a misdemeanor, I do not wish to be considered as intimating any opinion upon the correctness of the doctrine laid down therein, as applicable to a case where any *person* or officer is indicted for a negligent escape, and he is proved guilty of a voluntary escape.

4. But section 29 of the Penal Code provides, that "any sheriff, or other officer, who has the legal custody of any person charged with, or convicted of an indictable offense, and who, through negligence, suffers such person to escape, must, on conviction, be fined not less than two hundred, nor more than one thousand dollars." This provision of the law does not use the words, after the word officer, "or person," as the one does which provides for the punishment of voluntary escapes; and if it had appeared that the court below authorized the conviction of the defendant under section 28, above recited, then it would have raised the question, whether the defendant was a sheriff, or other officer, within the meaning of that section of the Penal Code. We are inclined to the opinion, that he is not, as charged in this indictment.

The jury assessed the fine at the lowest sum allowed by that section, but it is within the *maximum* fixed by section 207 of the Penal Code.—Revised Code, § 3754. If, then, he is not an *officer*, within the meaning of section 28 of the Penal Code, was he, as charged in the indictment, such a person as, at common law, could be indicted for, and convicted of a negligent escape? If so, under the foregoing and other provisions of the Penal Code, he could be convicted of the common-law offense, and punished as prescribed by sections 207 and 210 of the Penal Code, under this indictment.—Penal Code, § 570; Revised Code, § 4120. When convicted on such an indictment, of an offense which was indictable at common law, this section of the Code provides, that he must receive the punishment prescribed by the statute; and section 207 is the statute applicable to this case, if the defendant is such a person as, at common law, could be indicted for, and convicted of, a negligent escape.

There is some obscurity on this subject in the text books. It is averred in the indictment, with sufficient certainty, that the defendant had the "legal custody" of the prisoner who escaped; and we must presume, upon this record, that that averment was proven. Although the sheriff might not have the right to impose upon another, who was not bound by law to take the custody of a prisoner, the duty imposed upon himself by law, to hold prisoners charged with criminal offenses, so as to relieve himself from an indictment for an escape; yet, if he does deputize another specially to hold in custody a prisoner so charged, and the person so deputized has the legal custody of the prisoner, as averred in this case, we have no doubt that such person, if the prisoner escapes by his negligence, was indictable at common law, and, on conviction, was punishable by fine and imprisonment, at the discretion of the court.—2 Bishop's Crim. Law, § 1061 (926); Hawk. bk. 2, ch. 20, § 1. But the statute, in this State, authorizes the jury to assess the fine in cases of misdemeanor, which was done in this case. Penal Code, §§ 210–11.

Mr. Roscoe says: "A private person may be guilty either of a voluntary or of a negligent escape, where he has

another lawfully in his custody."—Cr. Ev. 460. It is said in Hawkins, "that whenever a person is found guilty, upon an indictment or presentment, of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum to be paid to the king, which seems most properly to be called a fine."—Bk. 2, ch. 19, § 31. And further, that "a sheriff is as much liable to answer for an escape suffered by his bailiff, as if he had actually suffered it himself; and that the count may charge either the sheriff or bailiff for such an escape"; and this, he says, is according to the common law.—Bk. 2, ch. 19. See, also, 1 Hale's P. C. 605, n. 1.

Although section 29 of the Penal Code only provides for the punishment of a "sheriff, or other officer," for a negligent escape; yet, as we have shown that any person who had the legal custody of another, upon a criminal charge, and suffered him to escape by negligence, was guilty of a misdemeanor at common law; and as the Penal Code provides a punishment for misdemeanors at common law, we are satisfied, that any person, not embraced by the statute, who is guilty of a common-law misdemeanor, may be indicted and convicted therefor, and punished as prescribed by section 207 of the Penal Code. Such has been the ruling of this court, and to the same effect is the case of *The Commonwealth v. Farrell*, 5 Allen, (Mass.) 130. And such conviction can be had on a statutory indictment for the greater offense, (which is punishable by statute,) where it includes the common-law offense, or the latter is of the same nature, but less in degree. This we conceive to be settled by the Penal Code and the reasoning in the case of *Henry v. The State*, 33 Ala. 389.

It results, that the judgment must be affirmed.

YARBOROUGH *vs.* THE STATE.

[INDICTMENT FOR LARCENY OF HORSE.]

1. *Proof of criminal acts not charged, as relevant to question of identity, intent, or guilty knowledge.*—Where the question of identity or intent is involved, or where it is necessary to show a guilty knowledge on the part of the prisoner, evidence may be received of other criminal acts than those charged in the indictment.
2. *Competency of convicted felon, who has been pardoned, as witness.*—A pardon restores the competency of a felon, who has been rendered incompetent as a witness by a conviction of an infamous crime, although it is not affirmatively shown “that the warrant of pardon restored him to the rights of citizenship.”
3. *Assessing value of stolen property.*—Under an indictment for the larceny of a horse, (Code, § § 3180, 3175,) it is not error to refuse to instruct the jury, at the instance of the defendant, “that they must assess the value of the property according to its value in gold.”

FROM the Circuit Court of Montgomery.

Tried before the Hon. GEO. GOLDTHWAITE.

THE indictment in this case, which was found at the April term, 1866, of the circuit court of Lowndes, contained two counts; the first count charging the defendants, James Yarborough, George Heller, *alias* George Hilliard, and Welcome Lovelace, with the larceny of a horse, the personal property of Robert D. Ware; and the second charging them with the larceny of a buggy, of the value of one hundred dollars, the personal property of said Ware. The venue was changed, in the case of the defendant Yarborough, to Montgomery county; and he was there tried, at the July term, 1867, on issue joined on the plea of not guilty. The following bill of exceptions was reserved by him to the rulings of the court on the trial:

“The State introduced evidence tending to show that, on the night of the 14th January, 1866, a horse and buggy were stolen in the city of Montgomery, the horse being the property of Robert D. Ware, as alleged in the indictment;

that subsequently, about the 17th, said horse and buggy were found in the possession of one W. Lovelace, George Heller, and the defendant, in Lowndes county, and afterwards in Pike county; and that they sold or swapped the horse, about the 19th of the same month, in Pike county. The proof showed that the buggy belonged to one T. B. Maddox; and thereupon a *nolle-prosequi* was entered as to the second count. The witnesses for the prosecution stated, on cross examination, that the defendant was a stranger to them, and passed by the name of Stewart; that he was in custody at Hayneville when they next saw him, and they recognized him as the same man; and they described his dress, and the manner in which he wore his hair and beard. To rebut this evidence, the defendant offered evidence tending to show that, at the time when the horse was said to have been in his possession in Lowndes and Pike, he himself was in the city of Montgomery; and that he did not wear his hair or beard, at or about that time, in the manner described by the witnesses. On this evidence, the State introduced as a witness, to prove his identity, one George Heller, who was one of the defendants mentioned in the indictment, and who, it was admitted, had been tried on the indictment, convicted, and sentenced to the penitentiary for a term of years, but had been pardoned by the governor; but it did not appear that he had been restored by the warrant of pardon to the rights of citizenship, or any other rights forfeited by his conviction. The defendant objected to the competency of this witness; but his objection was overruled by the court, and the witness was permitted to testify as to his identity; and he *again* excepted.

"After introducing evidence of the horse and buggy having been stolen, as above stated, the prosecuting attorney offered to prove that two mules, the property of T. H. Watts, were stolen at the same time in the city of Montgomery; and also proof tending to show that the mules so stolen were in the possession of said defendant, Lovelace, and Heller, at the same time they were in possession of the horse and buggy. The defendant objected, also, to this evidence; but his objection was overruled by the court,

and the evidence was permitted to go to the jury ; and he again excepted.

“ The only witness examined as to the value of the horse stated, on his direct examination, that he was worth about one hundred dollars ; but, on cross examination, being asked what the horse was worth in gold coin, stated, that he was worth about sixty or seventy dollars in gold coin. On this evidence, the defendant asked the court to charge the jury, that in assessing the value of the property, they must assess it according to its value in gold coin. The court refused this charge, and the defendant excepted to its refusal.”

The jury returned a verdict of guilty as charged in the indictment, and assessed the value of the horse at sixty-five dollars in gold, or one hundred dollars in currency ; and the court thereupon sentenced the defendant to imprisonment in the penitentiary for the term of five years, and rendered a judgment against him, in favor of said Robert D. Ware, for the value of the horse as assessed by the jury.

J. FALKNER, for the prisoner.

JNO. W. A. SANFORD, Attorney-General, *contra*.

JUDGE, J.—On the trial below, the State introduced evidence tending to show, that the property mentioned in the indictment had been stolen in the city of Montgomery, on the night of the 14th of January, 1866 ; and that subsequently the property was in the possession of the prisoner, and two other persons, named respectively Lovelace and Heller, in the county of Lowndes ; and that at a time still subsequent, it was in their possession in the county of Pike. The witnesses for the State stated, on cross examination, that when they saw the prisoner in the possession of the property as stated, he was a stranger to them, and passed by the name of Stewart ; that the next time they saw him, he was in custody, and they recognized him as the same man they had previously seen with the property ; and they described his dress, and the manner in which he wore his hair and beard, when they saw him in Lowndes and in Pike. The prisoner introduced evidence in rebuttal, tending to show that, at the time the property was said to

be in his possession in Lowndes and Pike, he was in the city of Montgomery; and that he did not wear his hair or beard, at or about that time, in the manner described by the witnesses.

This state of proof presented the material question of *identity* as to the prisoner. The record informs us that, after the introduction of the evidence above stated, the court permitted the State to introduce evidence, against the objection of the prisoner, "that two certain mules, the property of T. H. Watts, had been stolen at the same time in the city of Montgomery; and also proof tending to show that the mules so stolen were in the possession of said defendant, said Lovelace, and said Heller, at the same time they were in possession of said horse and buggy." Was this evidence properly admitted? It is stated by high authority, that "when the evidence is referrible to the point in issue, it will not be inadmissible, although it may incidentally apply to another person, or to another thing, not included in the transaction in question, and with regard to whom, or to which, it is inadmissible. Thus, although it is not material in general, and is therefore inadmissible, to inquire into any other stealing of goods than that specified in the indictment; yet, for the purpose of ascertaining the identity of the person, it is often important to show that other goods, which have been upon an adjoining part of the premises, were stolen on the same night, and afterwards found in the possession of the prisoner.—1 Phill. Ev. 169, 7th ed. So, on an indictment for arson, evidence has been admitted to show that property, which had been taken out of the house at the time of the firing, was afterwards discovered in the prisoner's possession."—Roscoe's Cr. Ev. 82-83. The authorities also hold, that evidence of other transactions than the one in question may be received, where the question of *intent* is involved, or where it is necessary to show "*guilty knowledge*."—Roscoe's Cr. Ev. 82-96. See, also, *Tharp v. The State*, 15 Ala. 749. The evidence objected to by the prisoner, was clearly admissible for the purpose we have stated; and we cannot place the court in error, by making the intendment that it was admitted for any other than the legal purpose.

2. George Heller was offered as a witness for the State, and permitted to testify as such, against the objection of the prisoner as to his competency. The witness had been embraced in the indictment, as a co-defendant, and had been tried, convicted, and sentenced to imprisonment in the penitentiary for a term of years, and had been pardoned by the governor; "but," says the bill of exceptions, "it did not appear that he had been restored by the warrant of pardon, to the rights of citizenship, or any other rights forfeited by his conviction." Section 2302 of the Code provides, among other things, that "no objection must be allowed to the competency of a witness, in any legal proceeding, whether examined orally or by deposition, because the witness has been rendered infamous by a conviction for any crime, except perjury or subornation of perjury." Waiving the question as to whether that portion of the section of the Code above quoted was repealed by the act of the 14th of February, 1867, and waiving the further question, whether the crime of which the witness was convicted renders him, in the eye of the law, so infamous as that, in the language of Chief-Baron Gilbert, "the credit of his oath is overbalanced by the stain of his iniquity;" still the witness was competent by virtue of his pardon alone. The legal effect of a full pardon is, to remove all disability arising from the conviction—is fully to rehabilitate the party—whether it be so expressed in the pardon or not.—1 Greenleaf's Ev. § 377; 1 Bish. Cr. Law, 762. The court, therefore, did not err in ruling the witness to be competent.

3. Neither can we say there was error in the refusal of the court to charge the jury, "that in assessing the value of the property, they must assess it according to its value in gold." The grade of the offense did not, in this case, depend upon the value of the property alleged to be stolen. Revised Code, § 3706.

There is no error in the record, and the judgment is affirmed.

EX PARTE HIXON.

[PETITION FOR DISCHARGE UNDER HABEAS CORPUS.]

1. *Criminal jurisdiction of justice of the peace.*—Under section 384 of the Penal Code, (Revised Code, § 3932,) a justice of the peace has jurisdiction of larceny, concurrently with the circuit court, where the value of the stolen property is less than ten dollars; and this jurisdiction is not taken away, or affected, by the acts approved respectively on the 7th December, 1866, and the 31st January, 1867, (Session Acts, 1866-7, pp. 115, 306,) which repealed the two acts approved on the 20th January, 1866, (Session Acts, 1865-6, pp. 118, 119,) conferring jurisdiction in criminal cases on justices of the peace, and regulating proceedings before them.

APPLICATION by Joe Hixon, a freedman, for the writ of *habeas corpus*, to revise the decision of the Hon. P. G. Wood, presiding in the city court of Selma, who refused to discharge the petitioner from imprisonment in the county jail of Dallas, under a sentence imposed by a justice of the peace on a conviction of larceny.

GEO. W. GAYLE, for the petitioner.

JOHN W. A. SANFORD, Attorney-General, *contra*.

A. J. WALKER, C. J.—The petitioner was convicted before a justice of the peace, of larceny of a chattel, of value less than ten dollars; and, being imprisoned under that conviction, claims his discharge, upon the ground that the justice had no jurisdiction.

By virtue of the constitution, (art. 1, § 9,) the legislature has power to dispense with a grand jury, and authorize prosecutions for larceny, and other misdemeanors, before justices of the peace. Having this power, the general assembly, by act of 20th January, 1866, (Pamph. Acts, p. 119,) enacted, that justices of the peace might take cognizance of, and try, all cases of misdemeanor, except cases of gaming, and violations of the revenue laws. On the

same day, a statute was adopted, to regulate proceedings for misdemeanors before justices.—Pamphlet Acts, p. 118. On the 7th of December, 1866, (Pamphlet Acts, 115,) the former of those statutes was expressly repealed; and on the 31st January, 1867, (Pamphlet Acts, 306,) the latter was expressly repealed. Intermediately between the adoption and repeal of those two statutes, and on the 23d February, 1866, the Penal Code was adopted; and it went into force on the 1st day of June, 1866. Section 384 of the Penal Code gives justices of the peace, concurrently with the county court, jurisdiction of certain specified misdemeanors; among which is larceny, when the subject of theft should be of less value than ten dollars.—Revised Code, § 3932. This section of the Penal Code was materially different from the act of 20th January, 1866, in this, that it gave jurisdiction only in certain specified misdemeanors, of minor importance, while the act of 20th January, 1866, gave jurisdiction of misdemeanors without restriction, except in two classes of cases. Therefore, the specific repeal of the latter act, and of the act regulating proceedings under it, was not a repeal of the section of the Penal Code, and it remains of force. The fact that the repealing acts of 7th December, 1866, and of 31st January, 1867, overlook the provision of the Penal Code, while they repeal the pre-existing statutes, indicates an express design to leave the Penal Code upon the subject unaffected. It is probable that those repealing statutes had their origin in the apprehension, that the acts of 20th January, 1866, were not repealed by the conflicting provisions of the Penal Code. We conclude, that the justice's jurisdiction, as given by the Penal Code, is not repealed and therefore the petitioner, upon the facts before us, is not entitled to his discharge during the period prescribed in the justice's sentence.

WOLF *vs.* THE STATE.

[INDICTMENT FOR LARCENY OF HOG.]

1. *Conviction of attempt to commit misdemeanor charged.*—Under an indictment for a misdemeanor, a conviction may be had of an attempt to commit the offense charged, if the proof fails to show that the offense was consummated.
2. *Larceny; what constitutes asportavit.*—Where the only witness for the prosecution, under an indictment for the larceny of a hog, testified, “that he heard a gun fire in the woods, and, immediately afterwards, heard a hog squeal; that he saw the defendant, soon afterwards, chasing the hog, and pursued him; that the defendant chased the hog about one hundred yards, and was in the act of striking it with his gun, when witness came up with him, and asked him what he was doing; and that he replied, he had shot at a squirrel, and hit the hog, and he wanted to see where the hog was shot,”—*held*, that this did not show a sufficient caption or *asportavit* to consummate the offense of larceny.

FROM the Circuit Court of Morgan.

Tried before the Hon. WM. B. WOOD.

THE indictment in this case was found on the 19th October, 1866, and charged, that the defendant, “Anderson Wolf, feloniously took and carried away a hog, the personal property of Lawson Wildman, of the value of seven dollars.” On the trial, at the March term, 1867, on issue joined on the plea of not guilty, the defendant reserved the following bill of exceptions: “On the trial of this cause, the prosecuting attorney introduced witnesses, and proved the following facts: In the fall of 1865, about an hour before sundown one evening, the witness heard a gun fire in the woods, not far from the residence of James Wilson, and, immediately afterwards, heard a hog squeal; that he saw the defendant, soon afterwards, chasing the hog, and pursued him, and came up with him just as he was in the act of striking the hog with his gun, but before he struck; that he (witness) called to him, and asked him what he was doing; that the defendant replied, he had shot at a squirrel,

and hit the hog, and he wanted to see where the hog was shot; and that the defendant had pursued the hog about one hundred yards, before he came up with him. The hog was not in an inclosure, but was running in the range; it belonged to Lawson Wildman, and was worth seven or eight dollars. The occurrence was in Morgan county. This was all the evidence in the case. The defendant thereupon asked the court to charge the jury—"1st, that they could not, upon this evidence, convict the defendant, because there was not a sufficient caption and *asportavit* to support the indictment; and, 2d, that the evidence was not sufficient to show such an actual or constructive taking and carrying away, as would make the offense larceny." The court refused each of these charges, and the defendant excepted to their refusal."

S. C. POSEY, for the defendant.

JNO. W. A. SANFORD, Attorney-General, *contra*.

BYRD, J.—The indictment is predicated on section 3174 of the Code, which declares, that "any person, who commits the crime of larceny, by stealing any personal property, not exceeding twenty dollars, is guilty of petty larceny," &c. This leaves the offense, as to its ingredients, except the value of the property, the same as at common law. As a general rule, an attempt to commit a misdemeanor, is a misdemeanor; and section 3301 of the Code prescribes the mode and measure of punishment.—1 Bishop's Criminal Law, § 683 (520); *The State v. Murphy*, 6 Ala. 765. On an indictment for a misdemeanor, a conviction for an attempt to commit the offense may take place.—Code, § 3601; Penal Code of 1866, § 647; Revised Code, § 4199. The first charge asked was correctly refused by the court. The prisoner might have been convicted of an attempt to commit larceny, without any caption or asportation of the property. But he could not be convicted of larceny, without proof of a taking and carrying away the property. All the evidence is set out in the bill of exceptions; and we are satisfied that it does not show such a taking and carrying away of the property as is necessary

to make out the offense of larceny.—2 Bishop's Criminal Law, §§ 804 (699), 806 (701); 3 Greenleaf's Ev. §§ 154, 155; *Spivey v. The State*, 26 Ala. 90, and authorities cited. The court should have given the second charge asked, and on this account, the judgment of the court must be reversed; and as a conviction may be had, for an attempt to commit the offense with which the prisoner is charged, if the evidence should satisfy the jury that he is guilty of such attempt, the cause will be remanded for another trial.

Reversed and remanded.

LEWIS vs. THE STATE.

[INDICTMENT AGAINST KEEPER OF PUBLIC BRIDGE, FOR TAKING ILLEGAL TOLL.]

1. *Sufficiency of indictment.*—In an indictment against the keeper of a public bridge, for exacting illegal toll, (Code, § 1199,) there must be an averment that the bridge was licensed by the commissioners' court of the county, and the prescribed rates of toll must be specified: an averment that the bridge "was chartered by the commissioners' court" of the county, and that the defendant, "being employed as the keeper of said bridge, did demand and collect from B. F. P. larger toll than is authorized by said charter," is not sufficient.

ERROR to the Circuit Court of Russell.

Tried before the Hon. ROBT. DOUGHERTY.

THE indictment in this case was found on the 16th November, 1866, and was as follows: "The grand jury of said county charge, that, before the finding of this indictment, Stephen D. Lewis, being employed as bridge-keeper of the Girard bridge, which bridge was chartered by the commissioners' court of said county, did demand and collect from Benjamin F. Piper larger toll than is authorized by said charter; against the peace," &c. The defendant demurred to the indictment; but the record does not show what grounds of demurrer, if any, were specified. The court

overruled the demurrer, and the defendant then pleaded not guilty; upon which plea issue was joined. The jury returned a verdict of guilty, and fined the defendant one cent; and the court rendered judgment accordingly. There is no bill of exceptions in the record, and the case is brought to this court by writ of error.

JOHN M. PHILIPS, for the plaintiff in error.

JNO. W. A. SANFORD, Attorney-General, *contra*.

JUDGE, J.—The court of county commissioners may, under section 1191 of the Code, grant licenses for the establishment of ferries, bridges, or causeways, within their respective counties, and may “fix the rates of toll and ferriage,” on all ferries, bridges, or causeways thus established; and under the act of December 9, 1864, (Session Acts, p. 86,) the same court has authority, under certain restrictions in the act named, to regulate and fix the rate of toll on all toll-bridges and ferries in their respective counties, and to alter the same from time to time, when in the judgment of said court it shall be necessary and proper.

Section 1199 of the Code provides, that “any keeper of any public ferry, toll-bridge, or causeway, who demands or receives from any person a higher rate of toll *than is prescribed* by the court of county commissioners,” is guilty of a misdemeanor. This section was evidently intended to apply to keepers of public ferries, toll-bridges, and causeways, *licensed by the court of county commissioners*, under authority of the statutory provisions above cited; and, doubtless, it was under this section of the Code that the indictment in the present case was found. The indictment charges that, before the finding thereof, “Stephen D. Lewis, being employed as bridge-keeper of the Girard bridge, which bridge was *chartered* by the commissioners’ court of said county, did demand and collect larger toll from Benjamin F. Piper than is authorized by said charter.”

Without stating with particularity all the requisites necessary to constitute a valid indictment in such a case, we point out several defects in the indictment before us, which show that the circuit court erred in overruling the defend-

ant's demurrer. The indictment, as we have seen, avers that the "Girard bridge was chartered" by the commissioners' court of Russell county. We are not aware of any statutory provision, authorizing the court of county commissioners to charter bridges; but it may *license* a person to establish a ferry, bridge, or causeway. If the bridge in question had been established pursuant to such a license, that fact should have been averred, together with the additional fact that the rates of toll had been prescribed by the court; and there should have been a distinct averment of the particular amount of toll demanded and received, and that the amount thus demanded and received, was a higher rate of toll for the particular transit, than was prescribed by the court of county commissioners.

There is no form of indictment given in the appendix to the Code, for such a case; but, if the defects we have named were supplied, the indictment would conform, substantially, to an analogous form prescribed by the Code, for use in the case of an indictment against a clerk of the circuit court, for receiving other or greater fees than are allowed by law for official services.—Appendix to Code, 706, form No. 64.

For the error of the court in overruling the demurrer to the indictment, the judgment must be reversed, and the cause remanded.

PARMER *vs.* THE STATE.

[INDICTMENT FOR GRAND LARCENY.]

1. *Severance of trial discretionary.*—The allowance of a severance, in a criminal case, is a matter of discretion with the primary court, (Penal Code, § 638; Revised Code, § 4190,) and its refusal is not error.
2. *Ownership of stolen property; variance.*—When the ownership of the stolen property is laid in three persons as executors, a conviction can not be had on proof that the ownership was in two of them only.

3. *Organization of grand jury shown by record.*—In a criminal case, the record must affirmatively show the organization of the grand jury; and an endorsement on an indictment, which purports to be signed by the foreman of the grand jury, is not sufficient proof of that fact.

FROM the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

THE indictment in this case, which was found at the October term, 1866, charged that, before the finding thereof, "to-wit, since the first day of June, 1866, Hansford, *alias* Hansford D. Grant, Aaron, *alias* Aaron Parmer, and Brooks, whose name otherwise is to the grand jury unknown, feloniously stole, took, and carried away twenty-five cows, twenty-five steers, and twenty-five yearlings, of the value of more than one hundred dollars, the property of Britton C. Tarver, Alexander C. McWhorter, executors, and Ellen C. McWhorter, executrix of Benjamin Tarver, deceased; against the peace," &c. On the trial, as the bill of exceptions shows, the defendant Parmer moved the court to allow a severance of his trial; "which motion the court overruled, and put said defendant on his trial with said Hansford D. Grant; to which ruling of the court said defendant excepted."

"The State proved, that the property alleged to have been stolen disappeared from the plantation of Britton C. Tarver, twelve miles from Montgomery, and was on the next day in the possession of the defendant, and was sold by him, on that day, in the city of Montgomery; and that the defendant, at the time he offered the property for sale, exhibited to the purchaser a written authority to sell them, which, it was admitted, was given to him by one Brooks, who was one of the parties charged in the indictment; and it was shown that said Brooks had fled from the trial, and had been in the possession of the property on the morning of the day it was sold by the defendant. The State offered to prove that the property alleged to have been stolen belonged to Britton C. Tarver and Alexander McWhorter, executors of Benjamin Tarver, deceased; to the introduction of which testimony the defendant objected, because it did not show the ownership of the property as charged in

the indictment. The court overruled the objection, and allowed the testimony to go to the jury; to which ruling, and to the admission of the testimony, the defendant excepted.

“This was all the testimony applicable to the questions of law presented by this bill of exceptions; and the defendant thereupon requested the court to instruct the jury, that if they should find, from the testimony, that the property alleged to have been stolen by the defendant did not belong to the persons charged in the indictment, they must find the defendant not guilty. The court refused this charge, and instructed the jury, that if they should find, from the evidence, that the property belonged to Britton [C. Tarver] and Alexander McWhorter, executors, as shown by the testimony, they should find the defendant guilty to which charge, and also to the refusal of the charge; asked, the defendant excepted.”

No counsel appeared in this court for the prisoner.

JOHN W. A. SANFORD, Attorney-General, for the State.

BYRD, J.—1. The court did not err in refusing to allow one of the defendants to sever in his trial.—*Hawkins v. The State*, 9 Ala. 137; Penal Code, § 638; Revised Code, § 4190.

2. If the ownership, in an indictment for larceny, is laid in a person by name, and it is proved that the property belongs to an estate, of which that person is executor or administrator, the proof will be sufficient to sustain the indictment.—2 Bishop's Crim. Procedure, § 686. If the ownership is laid in several persons, as joint owners, it is not sufficient to prove that it is in a less number than charged.—2 *ib.* 707. In this case, the ownership is laid in three persons, Tarver and McWhorter, executors, and Ellen McWhorter, executrix, of Benjamin Tarver, deceased. The evidence shows that the property belonged to the two persons, Tarver and McWhorter, executors of Benjamin Tarver, deceased. The court charged “the jury, if they should find the property belonged to Britton [C. Tarver] and Al-

exander McWhorter, executors, as shown by the testimony, they should find the defendant guilty."

Without deciding whether the ownership, as charged in this indictment, should be held to be laid in the persons named as individuals, or as executors of Benjamin Tarver, deceased, we are satisfied that the charge given by the court is erroneous. The Code provides, that ownership may be laid in one of several joint owners; but it does not authorize it to be laid in the name of any number of persons, and a conviction on proof of ownership in any one of them, or in a less number than the whole.

3. There is no evidence of the empanelling of the grand jury, other than the endorsement of the indictment, "A true bill, J. R. Dillard, foreman of the grand jury"; which is not sufficient.

It results, that the judgment of the court must be reversed; and the prisoner will remain in custody of the sheriff, until discharged by law.

GREEN vs. THE STATE.

[INDICTMENT FOR PERJURY.]

1. *Predicate for secondary evidence.*—To authorize secondary evidence of the contents of a written contract, which was in the possession of the prosecutor's agent or overseer, the testimony of said agent, to the effect that, "at the close of the year, he assorted his papers, and destroyed such as he regarded of no value; that he had frequently looked over his papers, and had not lately seen this contract; that he had never looked for it, and had no recollection that it was destroyed, though he was satisfied that it was, as he had not seen it for some time in looking over his papers for other objects,"—is not a sufficient predicate.
2. *Charge ignoring proof of venue.*—A charge to the jury in a criminal case, which authorizes them to find the defendant guilty without proof of the venue, is erroneous.
3. *Charge ignoring intent.*—A charge which authorizes the jury, in a prosecution for perjury, to find the defendant guilty without proof that the false oath was taken willfully and corruptly, is erroneous.

FROM the City Court of Montgomery.

Tried before the Hon. THOS. M. ABBINGTON.

THE indictment in this case, which was found at the February term, 1867, charged that, before the finding thereof, "Samuel, *alias* Samuel Green, on the trial of a certain cause before G. A. Cushing, a justice of the peace in and for the county aforesaid; in which cause the State of Alabama was plaintiff, and George G. Garner was defendant, upon a criminal charge against said defendant of assault; being duly sworn by said G. A. Cushing, who had authority to administer such oath, falsely swore, that a certain contract between him, said Samuel Green, and one Jefferson Falkner, was not read over to him, said Samuel Green, before he signed it, and that he did not know what said contract was at the time he signed it; the matters so sworn to being material, and the oath of said Samuel, *alias* Samuel Green, in relation to such matters, being willfully and corruptly false; against the peace," &c. The defendant pleaded not guilty, and issue was joined on that plea. On the trial, at the October term, 1867, the following bill of exceptions was reserved by the defendant:

"On the trial of this cause, a witness was examined on behalf of the State, who proved, that the defendant had made a certain contract with Jefferson Falkner, to labor for him from the date of said contract until the end of the year, and that said contract had been destroyed; that he was the agent of said Falkner, and kept his books and papers connected with his plantation and mill interest; that he assorted his papers at the close of the year, and destroyed such as he regarded of no value; that he had frequently looked over his papers, and had not lately seen this contract; that he had never looked for this paper, and had no recollection that it was destroyed, though he was satisfied that it was, as he had not seen it for some time in looking over his papers for other objects. On this testimony, the State proposed to prove the contents of said contract; to which the defendant objected; which objection the court overruled, and admitted proof of the contents of said contract; to which the defendant excepted.

“ It was proved on the trial, that this *witness* (?) was examined, on the trial of a suit pending before 'Squire Cushing, to prove that an assault had been committed on him by one George Garner, who was the supervisor of said Falkner's plantation, for refusing to obey the orders of said Garner as supervisor ; that he was asked, on cross examination, if he had not undertaken, by his contract with said Falkner, to obey all the orders made by the supervisor of the work and business of said Falkner ; and that he answered, in reply to this question, that the contract between himself and said Falkner was not read to him before he signed it, and he did not know what it was. The State then proved, that the agent of said Falkner, for the purpose of entering into a contract to that effect with them, read from without the guard-house, through the windows, to some four or five negroes who were within, embracing the defendant, a contract previously made with other negroes, whose names could not be given ; and that the contract thus read to the negroes in the guard-house was identical with that afterwards signed by the defendant, except that it was a blank printed form with names not inserted ; but it was shown, also, that the paper signed by the defendant was not read to him before he signed it. The State produced in evidence, also, a written contract between said Jefferson Falkner and other freedmen, which was printed in part, and which contained these words : ‘ We, Freeman and Lucy Merriwether, colored field-laborers, obligate ourselves to labor faithfully for Jefferson Falkner each day, Sunday excepted, until the first day of January, 1867 ; working according to, and obeying all orders made by the supervisor of the work or business ; and we also obligate ourselves to observe and be governed by the general rules and regulations of the farm or plantation.’ The State proved, also, that the contract signed by the defendant was, in language and effect, the same as that of Freeman and Lucy Merriwether, quoted above, as that read to the defendant out of the guard-house.

“ This was all the testimony applicable to the questions of law presented for revision. Thereupon, the defendant asked the court to charge the jury, ‘ that if they believed,

from the evidence, that the contract of another party was read in the hearing of the defendant, and a contract of similar import was subsequently signed by the defendant, before it was read to him; and that the defendant, in a suit pending against one Garner, in favor of the State, swore that he signed his contract before it was read to him, and did not know what its contents were; and should believe that the statement made by the defendant was correct, he could not be found guilty of the charge of perjury, although a similar contract had been read to him before he signed his own contract.' The court refused this charge, as calculated to mislead, and informed the jury, that if they believed, from the evidence, that a contract with another party was read in the hearing of the defendant, and a contract identical in terms was subsequently signed by him before it was read to him; and should also believe that, in a suit by the State against one Garner, the defendant swore that he signed his contract before it was read to him, and did not know what its contents were,—it was their duty to convict him; but, if they should not be satisfied that the contract signed by him was identical with the contract which he had previously heard read, or, if identical, they should not be satisfied that he was so informed before he signed it, then it was their duty to acquit. To the charge given, and also to the refusal of the charge asked, the defendant excepted."

No counsel appeared in this court for the prisoner.

JNO. W. A. SANFORD, Attorney-General, for the State.

JUDGE, J.—No sufficient predicate was laid for the introduction of secondary evidence of the contract between the prisoner and Jefferson Falkner. The witness who testified to his possession of the books and papers of Mr. Falkner, had never looked for the original contract, and had no recollection that it had been destroyed. *Non constat*, but that it was in existence, and among the other papers of Falkner in the possession of the witness at the time of trial.—1 Greenl. Ev. § 568, and authorities cited; 4 Phil. Ev. (Cowen & Hill's Notes,) pp. 404-5; *Tannis v. Doe, d. St.*

Cyre, 21 Ala. The city court therefore erred in permitting the secondary evidence to be introduced.

2. The charge of the court authorized the jury to find the prisoner guilty without proof of the venue. This was also erroneous. —Shepherd's Digest, p. 20, § 22.

3. The charge was also erroneous, in authorizing the conviction of the prisoner without proof that the false oath was taken *willfully* and *corruptly*.—1 Bishop's Criminal Law, § 233; *Ogletree v. The State*, 28 Ala. 693.

The judgment must be reversed, and the cause remanded. Let the prisoner remain in custody, until he is discharged by due course of law.

SCHEIBLE *vs.* BACHO.

[BILL IN EQUITY FOR CANCELLATION OF MORTGAGE, OR REDEMPTION.]

1. *Status of Confederate and State governments during late war.*—On principles of international law, the governments of the Confederate States and of the State of Alabama, during the late war in the United States, were governments *de facto*.
2. *Validity of contract made within Confederate States during war.*—The validity of contracts made within the territorial jurisdiction of the Confederate States, during the late war with the United States, must be tested by the constitution and laws of the governments *de facto* which then existed in that jurisdiction, and not by the constitution and laws of the United States.
3. *Enforcement of executory contract, based on loan of Confederate States treasury-notes.*—An executory contract, based on a loan of Confederate States treasury-notes, being valid by the *lex loci contractus* at the time it was entered into, may now be enforced in the courts of this State, acting under the constitution and laws of the United States; although the issue of such notes by the Confederate States was in contravention of the policy and interests of the United States; and although the use of such notes, in private contracts between citizens, remotely contributed to the furtherance of the original illegal purpose for which they were issued. (BYRD, J., *dissenting*, held—1st, that the ordinance of secession, adopted in Alabama on the 11th January, 1861, was a nullity; 2d, that the constitution of the United States was, in legal contemplation, in

force throughout the whole country during the war; 3d, that the validity of all contracts, now sought to be enforced through legal tribunals, must be determined by reference to the laws and policy of the United States; 4th, that the issue of treasury-notes by the Confederate States, to circulate as money, was contrary to the laws and policy of the United States, and the circulation of such notes as money, or as the basis of contracts, was equally illegal, and contrary to public policy; and, 5th, that executed contracts, though based on such treasury-notes, should not now be disturbed by the courts.)

4. *Ordinance No. 26, approved Sept. 28, 1865, as to parol evidence showing consideration of contracts, held applicable to chancery suit for redemption.*—A bill in equity, for redemption under a mortgage, is within the provisions of the third section of the ordinance adopted by the State convention on the 28th September, 1865, (No. 26,) which declares, “that in all suits upon contracts made between the 1st September, 1861, and the 1st May, 1865, parol evidence shall be admissible to prove what was the consideration thereof, and whether or not the parties thereto understood or agreed that the same should be discharged by a payment in Confederate currency or treasury-notes; and if so, or if it appears so from the contract, then to show what was the real or true value of the consideration of the said contract, and what amount the plaintiff is legally, justly, and equitably entitled to receive according to the contract, by the judgment of the court.”
5. *Same; construction and validity of.*—To authorize the reduction of a debt under this section of said ordinance, it must not only be shown that the consideration was Confederate currency, but also that there was an agreement or understanding, express or implied, that the debt might be discharged in such currency; and thus construed, the ordinance simply changes a rule of evidence, and does not impair the obligation of contracts.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. N. W. COCKE.

THE bill in this case was filed, on the 31st August, 1865, by Henry L. Bacho, against Frederic K. Scheible; and sought the cancellation of a mortgage, and of the note which it was given to secure; or a redemption under the mortgage, in the event it should be held valid, and an account; also, an injunction of an action at law, which the defendant had instituted to recover the possession of the mortgaged premises, and general relief. The mortgage, which was made an exhibit to the bill, was executed by said Henry L. Bacho and wife; was dated the 20th October, 1863; conveyed to said Frederic Scheible a lot in the city of Mobile, with a brick store thereon erected, and was sub-

ject to the following condition: "Provided always, and these presents are upon this express condition, that if the said Henry L. Bacho shall well and truly pay to the said Frederic Scheible, or his heirs, the sum of four thousand dollars, according to his certain promissory note, bearing even date with these presents, negotiable and payable at the Bank of Mobile, on the first day of November, 1864, without default, then these presents shall cease," &c. The bill alleged, that the note and mortgage were given to secure the payment of four thousand dollars, loaned by the said Scheible to said Bacho on the 20th October, 1863, in Confederate States treasury-notes of the old issue; that the money was borrowed by Bacho, at the solicitation of Scheible, "and with the understanding that it should be returned in twelve months, and that the complainant should pay to the said Scheible, for the use thereof, one barrel of lard, the value of which exceeded the lawful interest on the money so borrowed;" that the complainant delivered the barrel of lard, and also executed and delivered the note and mortgage, according to the stipulations of the contract; that the value of such treasury-notes, at that time, "was about twelve for one in gold or silver;" "that it was understood, at the time said money was borrowed, that payment was to be made in like currency, and defendant did not in any manner intimate that any other would be required;" that the complainant tendered to said Scheible, at the maturity of said note, in Confederate States treasury-notes of the new issue, the full amount due on the note; that this tender was made by complainant, first in person, and afterwards through an agent, and was rejected by the defendant, "who refused to receive Confederate money on any terms;" that the complainant retained the money so tendered, and kept it on hand ready to deliver at any time to the defendant, and held it "ready to pay into court, and subject at any time to the order of the court." The complainant insisted—"1st, that said note and mortgage are voidable in this honorable court, on the ground that it was obtained by fraud and misrepresentation; 2d, that the consideration was illegal and unconstitutional, and, for this reason, the

court ought not to allow their enforcement at law ; and, 3d, that even if said note and mortgage be in other respects good, yet the tender destroyed their legal effect ;” and he therefore prayed relief as above stated.

The defendant answered the bill, admitting the loan of the four thousand dollars in Confederate States treasury-notes, and the execution of the note and mortgage to secure the payment of the money ; but denying the averments of the bill as to the terms of the contract between the parties. He alleged, that the complainant asked the loan of the money, to enable him to buy the house and lot conveyed by the mortgage, which at that time belonged to one Hallett, and was occupied by the complainant as the tenant of said Hallett, and offered to have it conveyed to him, or to give him a mortgage on it ; that he agreed to lend the money to complainant for that purpose, “without charging him any interest, provided said Bacho would agree to pay said sum of money, in current funds, six months after the war was over ;” that Bacho “distinctly agreed to this proposition, and respondent accordingly delivered the money to him, and took no note or receipt for the same, but told him to go and purchase the house and lot, and then to make a note and mortgage to respondent ;” that this interview took place on the 19th October, 1863 ; that the complainant purchased the house and lot on the same day, at the price of five thousand dollars in Confederate money, and used the money borrowed from respondent in making payment for it ; that the value of the house and lot at that time, as respondent informed complainant after examining the premises, was five thousand dollars in gold or silver ; that complainant and respondent went together, on the next day, to an attorney’s office, for the purpose of having the note and mortgage executed ; that the complainant “told the attorney what was wanted, and respondent returned to his business ;” that the note and mortgage were delivered to him on the evening of the same day, and he supposed they were drawn according to the terms of the contract, but he did not read them, “being unable to write the English language, or to read it understandingly.” He admitted the tender, as alleged, and his refusal thereof ; and insisted

that, by the terms of his contract with complainant, he was not bound to accept such tender. He admitted that the complainant had delivered to him a barrel of lard, but alleged that it was given and accepted as a present, and not by way of interest on the money loaned.

The complainant offered in evidence, on the hearing, the depositions of George Conway, T. P. Miller, and Br. Tardy ; and the defendant offered in evidence the depositions of Caleb Price, Willis Pope, Moses Waring, and Julia Scheible, "and the mortgage and note exhibited with bill;" but the note was not made an exhibit to the bill, nor is a copy of it any where found in the record. Conway was the attorney who drew the note and mortgage, and who made the tender for the complainant ; and he testified to these facts in answer to the interrogatories propounded by the complainant. He stated, also, in answer to the cross interrogatories on the part of the defendant, that when the parties came to him, to have the note and mortgage drawn, they stated that the money had been loaned to the complainant to enable him to purchase the house and lot, and had been used by him for that purpose ; that he asked some question about the interest, and was told by them that no interest was charged ; that the complainant afterwards told him, that he had made the defendant a present of a half-barrel of lard ; that the property was worth, in his opinion, in January, 1861, and at present, five thousand dollars in gold ; that in 1863, "the currency having become much depreciated," ten thousand dollars was a reasonable price for it ; that it would have rented for twelve hundred dollars, from November, 1863, to November, 1864, and for fifteen hundred dollars for the year ending November, 1866. Miller testified, that the value of Confederate treasury-notes, as compared with gold, on the 19th October, 1863, was about eleven for one. Tardy testified, that on the 19th October, 1863, the property was worth five thousand dollars in Confederate treasury-notes. Price testified, that the property was worth, in the present currency, five thousand dollars ; and Waring, that it was never worth less than that sum in gold, and that the annual rent was worth, in 1865-6, one thousand dollars.

On final hearing, on pleadings and proof, the chancellor held, that the complainant was entitled to relief; and he therefore ordered a reference to the master, to ascertain—"1st, what was the value in gold, on the 20th day of October, 1863, of the Confederate treasury-notes loaned by the defendant to the complainant, and what amount is now due thereon, including interest on said value from the 4th day of November, 1864; and, 2d, what is the value of the sum so found to be due in gold, in the present currency of the country, at this time." The master reported, that the value in gold, of the money loaned in Confederate treasury-notes, with interest thereon from the 4th November, 1864, was four hundred and twenty-nine 16-100 dollars; which sum, reduced to its value in United States treasury-notes at the time the report was made, (February 6, 1867,) amounted to five hundred and seventy-nine 36-100 dollars. The report was confirmed, without objection by either party, on the 8th February, 1867; and the complainant having paid into court the sum so reported by the master to be due, the chancellor rendered a final decree, perpetuating the injunction of the action at law, declaring the mortgage satisfied, directing an entry of satisfaction to be made by the defendant on the records of the probate court in which it was registered, ordering the money in court to be paid to the defendant, and dividing the costs equally between the parties.

The appeal is sued out by the defendant, and the decree of the chancellor is assigned as error.

W. BOYLES, for the appellant.—1. This court has decided, in the recent case of *Watson and Wife v. Stone*, (40 Ala. —,) that the late Confederate States, during its existence, was a government *de facto*. The logical consequence of this principle is, that contracts made within the limits of the Confederate States during the war, if not contrary to its laws and policy, were valid and binding between the parties.

2. The third section of the ordinance of the State convention, adopted on the 28th September, 1865, if it be applicable to any chancery suit, should not be applied to a

case like this. The framers of that ordinance could not have intended, by said section, to clothe the chancery court with power to cancel and set aside a mortgage to land, where there is no pretense of any fraud, accident, or mistake. Such a construction of the ordinance would make it impair the obligation of contracts, and destroy vested rights. A mortgage is a purchase *pro tanto*.—47 Maine, 514. If the ordinance be applicable to a mortgage, or conditional, or partial sale, it must equally apply to an absolute sale; if to an executory, then also to an executed contract. The constitutional provision, in guarding the inviolability of contracts, recognizes no distinction in their nature.—6 Cranch, 135; 7 Cranch, 164. Any law, which enlarges, abridges, or changes the intention of the parties, resulting from the stipulations of the contract, impairs its obligation. 12 Wheaton, 256, 327; 3 Wash. C. C. 319; 8 Wheaton, 84; 4 Wheaton, 197; 24 Howard, 461; 40 Penn. St. 324; 32 Barbour, 358.

3. If the ordinance be applicable to such cases, there is no evidence in the record to bring this case within its terms. There is no proof of any express agreement to receive Confederate treasury-notes in payment of the debt; and the facts of the case negative the existence of any implied understanding to receive them.

4. If the case be held to fall within the terms of the ordinance, then the question arises, what amount is the defendant "legally, justly, and equitably entitled to receive, according to the contract," under the pleadings and proof. It is submitted, that this provision of the ordinance was designed and intended to give the courts and juries of the country the power to do substantial (or natural) justice between the parties, without reference to the technical rules of law; and that "the real and true value of the consideration of the contract," by principles of equity and natural justice, is not the value of the treasury-notes in gold, but the value of the property which was bought with it, and to buy which it was expressly loaned. The property was worth five thousand dollars in gold when it was bought by Bacho, and it is worth that amount to-day; and four-fifths of the purchase-money was advanced by the defend-

ant. The money was loaned for the specific purpose of making the purchase, and under an agreement, as a condition precedent, that the property should be conveyed to the defendant to secure the re-payment of the money; and the property was purchased and conveyed accordingly. A court of equity will not compel a divestiture of the legal title, without requiring the complainant, as a condition of relief, to pay the amount due in equity and good conscience. *Pearson v. Bailey*, 23 Ala. 537; 6 Cowen, 139; 8 Gill & J. 170; 10 Ohio, 501. If the complainant had bought the property on a credit, and given Hallett a mortgage, to secure the payment of the purchase-money, and Hallett had sued to recover the possession; would not the complainant be compelled, as a condition precedent to relief, to pay the true value of the property? The defendant, under the facts of the case, should be subrogated to the rights which Hallett would have had in the case supposed. 35 Penn. 111; 6 Watts, 221; 4 H. & M. 436; 3 Paige, 117; 6 Watts & Serg. 190; 38 Penn. 512.

DARGAN & TAYLOR, *contra*.—1. The transaction between the parties, as disclosed by the pleadings and proof, was a mere loan of money, with a mortgage to secure its payment. The debt was payable, as shown by the note and mortgage, at the expiration of twelve months, and not, as the defendant alleged in his answer, six months after the close of the war. The chancellor allowed the defendant the value of the money which he loaned, with legal interest thereon; and this is all he could claim in a court of equity.

2. The doctrine of subrogation has no application to the case. Hallett had no rights or equities, to which Scheible could be subrogated.—*Foster v. Atheneum*, 3 Ala. 310. The fact that Bacho made a good bargain with the money loaned to him, certainly gives Scheible no claim to share in the profits; as well might Bacho insist, if his bargain had proved a bad one, or his house had been burned down, that Scheible should share the loss.

3. The reduction of the debt was authorized by the ordinance of the 28th September, 1865, which applies equally to all debts, the consideration of which was Confederate

money, whatever the nature of the contract, or the form of the suit in which it is involved. The ordinance does not require proof of an express agreement to receive Confederate money in payment of the debt: an implied understanding, as shown by the nature of the contract and conduct of the parties, is sufficient. A loan in currency so greatly depreciated, if nothing were said as to the character of the funds with which payment should be made, must be presumed to have been made in contemplation of payment in the same or similar currency. There is no proof whatever that the parties intended a payment in gold, or in United States currency: on the contrary, such intention is repelled by their conduct, and by the character of the transaction itself. Nothing was said by either party, as to a payment in gold or United States currency, when they employed the attorney to write the note and mortgage; and when the defendant rejected the tender of the Confederate treasury-notes, he placed his refusal on the ground that he must first see another person who was interested with him. The value of the property was estimated by Tardy to be five thousand dollars in Confederate treasury-notes; and the fact that Hallett sold it for that sum, is proof of its market value at the time. To borrow four thousand dollars in depreciated currency, (worth less than four hundred in gold,) with which to purchase property worth five thousand in currency, and to promise to pay the loan in gold, would be the contract of an idiot—would be usurious, unconscionable, and inequitable; and no court would lend its aid to enforce such a contract. If the property had been worth five thousand dollars in gold, the entire profits of the purchase would have enured to the lender. Why borrow from Scheible at such usurious rates, when, as the witnesses testify, the money could have been borrowed easily on the property itself?

4. The ordinance of September 28, 1865, in its application to this case, simply changes a rule of evidence, and does not impair the obligation of contracts. If the constitution of the United States is invoked to defeat the operation of the ordinance, then it is contended, that the note

itself is void, under that constitution, for illegality of consideration.

A. J. WALKER, C. J.—The complainant filed his bill in this case, praying alternative reliefs. The reliefs alternatively prayed were—that a mortgage on land, given by him, should be set aside, upon the ground that it was void, because it was predicated upon the loan of Confederate treasury-notes ; or that he should be permitted to redeem, upon payment of the value of the Confederate treasury-notes, the loan of which was secured by the mortgage, or upon the payment of such sum as the court may direct. The chancellor granted a redemption, upon payment of the value of the Confederate treasury-notes ; and the defendant appealed. One of the members of this court attains the conclusion, that the decree of the court below should be affirmed ; because the mortgage, being predicated upon the loan of Confederate treasury-notes, is void, and the decree is therefore too favorable to the appellant. The majority of the court are of the opinion, that the decree should be reversed.

We will first consider the point upon which our brother attains his conclusion. We hold, that the mortgage is not void. We maintain, that executory contracts, made during the late war, in the State of Alabama, are valid, and enforceable in the courts of this State, notwithstanding they may have been predicated upon a loan of Confederate treasury-notes. This proposition, we think, is sustained, when it is established that the Confederate States, and the State of Alabama, were *de-facto* governments. We discussed this question in *Watson v. Stone*, (40 Ala. —,) and held, that they were *de-facto* governments. Since that time, Chief-Justice Chase, of the supreme court of the United States, sitting as a circuit judge in North Carolina, in the case of *Shorthridge v. Macon*, expressed the contrary opinion. If the supreme court of the United States had so held, we would promptly yield to its authority, and reverse our ruling on this subject ; but we have the opinion of only one of the judges of that court, and we think the evidences

justify the conclusion, that the action of the court will be different.

The decisions of the supreme court of the United States in the *Prize Cases*, (2 Black, 666-7-8,) *The Venice*, (2 Wallace, 258,) *Mrs. Alexander's Cotton*, (*ib.* 404,) *The Peterhoff*, (5 Wallace, 28-60,) seem to justify the conclusion, that that tribunal will decide, that the governments of the Confederate States, and of the State of Alabama, were *de-facto* governments. The power and dominion of those governments, within certain geographical boundaries, were fully established, and for a long time maintained. They gave laws to the people, and enforced them in regular courts. The United States government declared all the people within those boundaries enemies, and refused to them, without regard to their political opinions, redress in its courts; and prohibited all commercial intercourse between the people within the loyal States, and those within the hostile section. It is difficult to conceive how, under these circumstances, the supreme court of the United States can hold that there was not an actual government in fact.

These governments were those in whom *stet rei agendi potestas*; and therefore, according to publicists of highest repute, were capable of recognition in diplomatic relations. 1 Kent's Com., m. pp. 40, 167. In the case of *Folliott v. Ogden*, (1 H. Blacks. 123,) Lord Loughborough decided, that New York was, in 1779, a State capable of declaring a forfeiture of goods, notwithstanding the treaty of peace was not made with Great Britain until 1783. Lord Kenyon, on writ of error in the same case, expressed the contrary opinion.—3 Term R. 401. The supreme court of the United States, in the case of *Ware v. Hilton*, (3 Dallas, 199,) compared the antagonistic opinions of Lord Loughborough and Lord Kenyon, and approved the former.

In the case of *Ware v. Hilton*, (*supra*,) Judge Chase, delivering the decision of the supreme court, inquired, at what time the colonies became a separate government, and at what time the war between Great Britain and her colonies became a public war; and held that the governments of the latter became separate and distinct when the war became public. The confiscation, in 1777, of a debt due by a citi-

zen of Virginia to a British subject, under a Virginia statute, was in this case sustained.

When the attitude and condition of New York and Virginia in 1777 and 1779 is contrasted, in the light of history, with that of the States within the area under the control of the Confederate States, there is an obvious want of reason for attributing to the former the character of a government, and denying it to the latter. The former were successful in their contest with the parent country; and the latter was unsuccessful. This difference may affect the question, whether there was a *de-jure* government in the eye of the law; but it can not affect the question of a *de-facto* government, for that depends, not upon right, but upon fact, regardless of right. With this distinction, perhaps, in his mind, Judge Chase, in *Ware v. Hilton*, (*supra*,) affirmed that, "from the 4th July, 1776, the American States were *de facto*, as well as *de jure*, in the possession and actual exercise of all the rights of independent governments."

The supreme court of the United States, in the case above noticed, refers to Vattel, as an authority on the *status* of the parties to a civil war in its various stages. That author, in his work on the Law of Nations, (pp. 424-7,) says: "When a party is formed in a state, who no longer obey the sovereign, and are possessed of sufficient strength to oppose him; or when, in a republic, the nation is divided into two opposite factions, and both sides take up arms—this is called a civil war. * * * * A civil war breaks the bonds of society and government, or, at least, suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. These two parties, therefore, must necessarily be considered as thenceforward *constituting, at least for a time, two separate bodies—two distinct societies*. Though one of the parties may have been to blame in breaking the unity of the state, and resisting the lawful authority, they are not the less divided in fact. * * * * But, when a nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground, in

every respect, as a public war between two different nations. Whether a republic be split into two factions, each maintaining that it alone constitutes the body of the state, or a kingdom be divided between two competitors for the crown—the nation is severed into two parties, who will mutually term each other rebels.”

Let this description of a party to a civil war, become in fact a separate nation, be contrasted with the description in 1862 of the Confederate States by the supreme court of the United States in the *Prize Cases*, and it seems inevitable, either that the authority of Vattel must be overthrown, or that court must pronounce the Confederate States a government in fact. The court says: “In organizing this rebellion, they have acted as States, claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign state. The *right* to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the general government. It is no loose, unorganized insurrection. It has a boundary, marked by lines of bayonets, and which can be crossed only by force. South of this line is enemies’ territory, because it is claimed and held in possession by an organized, hostile, and belligerent power.”

The court of appeals of Kentucky, in *Hildreth v. McIntyre*, (1 J. J. Marshall, 206,) discussing the question of *de-facto* officers and *de-facto* governments, used the following language: “When the government is entirely revolutionized, and all its departments usurped by force, or the voice of a majority, then prudence recommends, and necessity enforces, obedience to the authority of those who may act as the public functionaries; and in such cases, the acts of a *de-facto* executive, a *de-facto* judiciary, and a *de-facto* legislature, must be recognized as valid. But this is required by political necessity.”

In 1818, a question arose in the State of Mississippi, as to the law which prevailed there before the organization of

the territorial government in 1799. The supreme court decided, that the law of Spain prevailed, and controlled the question involved; remarking, that "Spain, until the fall of 1798, exercised jurisdiction over this country. Whether this jurisdiction was rightful, is not the subject of inquiry—it is sufficient if it was a government *de facto*."—*Chew v. Calvert*, Walker's R. 54.

In 1866, the supreme court of Arkansas, after a careful examination of the subject, held that there was in Arkansas, during the late civil war, a *de-facto* government.—*Hawkins v. Filkins*, 24 Ark. 286.

This question of a *de-facto* government we discussed with care in the case of *Watson v. Stone*, (40 Ala. —,) and to the opinion in that case we refer for arguments and authorities, which it would be mere idle repetition to reproduce here. We feel a thorough conviction, that the proposition, asserting the existence of governments at least *de facto*, is maintained by unanswerable argument and authority, and that it will be approved by the supreme court of the United States.

[2.] From this proposition it is a corollary, that the contracts made within the territorial jurisdiction of those *de-facto* governments are to be tested and construed according to their laws, and not by the constitution and laws of the United States; as to which government they stood, for the time being, as separate and distinct organizations. The Confederate States, and the State of Alabama, having been at the time when this contract was made *de-facto* governments, its validity in its creation is to be tested by the laws of such governments. It stands as a contract made in a foreign government. The legality of its making is governed by the *lex loci contractus*. In the issue, circulation, and use of the Confederate treasury-notes, there was a perfect consistency and harmony with the laws of those governments. There was, therefore, no illegality in the contract at the time and place of its making.

[3.] It is contended, that even with the concession of the above stated propositions, the executory contract must be treated as void, in courts acting under the authority and constitution of the United States. It is certainly correct,

that contracts made in foreign countries are executed on a principle of comity ; and that the doctrine, that contracts, valid by the laws of the country where made, will be enforced in any other country, is subject to several exceptions. One of those exceptions is, that a contract will not be enforced, when it is opposed to the national policy, or national institutions.—Story on Conflict of Laws, § 244. It may be conceded, that, under this rule, the issue of Confederate treasury-notes was in contravention of the policy of the United States, because of its immediate effect in maintaining a contest for the dismemberment of the nation. It may also be conceded, that the making of contracts upon the basis of that currency had a *remote* tendency in the same direction. But contracts are not treated as void, because they have such *remote* tendency. The issue of the Confederate States currency had the effect of contributing means to prosecute the war against the United States. The passage of that currency in the making of contracts may have contributed indirectly to the preservation of its value. This indirect, remote effect does not vitiate the contracts based upon such currency. We propose, first, to sustain this proposition by an examination of the authorities, especially of the decisions of the supreme court of the United States.

Armstrong v. Toller, (11 Wheaton, 258,) was a case, where there was an illegal and fraudulent importation of goods. The consignee, who knew the character of the importation, became surety for the payment of the duties, and responsible for the expenses of defending a prosecution for the illegal importation. Being compelled to make payment on account of his suretyship and responsibility, he successfully maintained a suit for reimbursement. The objection was made, that the transaction was tainted by the illegality of the illegal importation ; but it was upheld, upon the ground that it was upon a new consideration, and did not grow *immediately* out of the illegal act.

In the case of *Randon v. Toby*, (11 Howard, 493,) it was decided by the supreme court of the United States, that a note given in Texas, for the purchase of negroes illegally imported from Africa some years before, and sold into

slavery, was valid. The court, *arguendo*, said: "If the defendant should be sued for his tailor's bill, and come into court with the clothes made for him on his back, and plead that he was not bound to pay for them, because the importer had smuggled the cloth, he would present a case of equal merits."

In *McBlair v. Gibbes*, (17 Howard, 232,) there was an association for fitting out a military expedition, in violation of the neutrality laws of the United States, which was illegal. An assignment of one of the shares was held by the supreme court of the United States, after the fullest consideration and examination of authorities, to be valid.

In *Orchard v. Hughes*, (1 Wallace, 73,) a mortgage was foreclosed, which secured a debt based on the notes of a bank chartered illegally, and for fraudulent purposes; and which notes, though of value at the time, finally proved worthless in fact.

In the case of *Brooks v. Martin*, (2 Wallace, 70,) there was a partnership for the transaction of business illegal and contrary to public policy. One of the partners, having made a fraudulent purchase of another's interest, was compelled to account for everything received, notwithstanding the illegality of the partnership business was pleaded.

In our own court, in the case of *Branch Bank at Montgomery v. Crocheron*, (5 Ala. 250,) a question strikingly illustrative of the point in this case arose. Bills were issued by the Montgomery and West-Point Railroad Company, engraved and fitted for circulation as money. These bills were passed to the Branch Bank at Montgomery, with the understanding that they were to be loaned to a corporation. They were so loaned, and the action was brought upon the security given for the loan. The issue of these notes by the Montgomery and West-Point Railroad Company was held by this court to be illegal. It was further held, that they would be invalid in the hands of the bank which participated in the illegal purpose, or in the hands of any person participating in the illegal intention, to whom they might come. But the court decided, that beyond this the law would not go, and that the sanctity of the law was sufficiently vindicated by declaring the paper

void in the hands of one *immediately* connected with the illegal transaction. It was held, that the security given for the loan of those bills was recoverable.—See, also, *McGehee v. Powell*, 8 Ala. 827.

Authorities of like character crowd upon our attention from many quarters, but we forbear to notice them. Enough have been adduced to exemplify and establish the principle proposed to be maintained. That principle is, that although an act illegal, or contravening public policy, has been done, those acts which follow it, and grow remotely out of it, being independent transactions, done without complicity in the original illegal purpose, will be sustained, notwithstanding they have incidentally had the effect of contributing remotely to the furtherance of the original illegal design. And the cases show that it makes no difference, that the new contract is made with a knowledge on the part of the parties thereto of the illegality of the original transaction. For example: the smuggling of goods is indirectly encouraged by the subsequent sales of them; yet such sales are valid. The issue of paper to circulate as money, by a corporation, in violation of law, being illegal, is encouraged by the subsequent use of the money by innocent parties as the basis of contracts; yet such contracts are valid. The importation of Africans is encouraged by the subsequent sales of them by and to innocent parties; yet contracts for payment for such sales are valid. A bank fraudulently and illegally issues bank paper; yet a mortgage for the security of the loan of such paper, when of value, is foreclosed, notwithstanding the loan and mortgage contribute indirectly to the accomplishment of the original illegal and fraudulent purpose of giving currency to the paper. A like remark might be made in reference to each one of the authorities cited above.

Judge Story, in his work on the Conflict of Laws, (§§ 243-253,) clearly asserts the doctrine we are maintaining. He thus states the principle, which underlies the cases we have cited: "But the principle stops here, and is not extended to new and independent transactions after the illegal act. If the new contract is wholly unconnected with the illegal act, and is founded on a new consideration, and is

not part of the original scheme, it is not tainted by the illegal act, although it may be known to the party with whom the contract is made. Thus, if after the illegal act is accomplished, a new contract (not being unlawful in itself) is made by the importer, for a sale of the goods to a retail merchant, and the merchant afterwards sells the same to a tailor, or to a customer, who had no participation whatsoever in the original scheme, such new contract will be valid, although the illegality of the original importation is known to each of the vendees at the time when he entered into the contract."

The obvious application of the principle deduced from these authorities is this: that although the establishment of the Confederate government may have been illegal, and the issue of treasury-notes for the support of that government and its war may have contravened the policy, and opposed the interests of the United States; and although the use of such treasury-notes, as the basis of contracts, may have incidentally contributed some remote influence in furthering the original illegal design, by assisting to give them value and circulation; yet such contracts are not therefore void. In the event of a war between the United States and Great Britain, if the latter government should enter into a contract with the Bank of England, that it should largely increase its circulation for the purpose of making a loan to the British government, so as to enable it to wage efficient war on the United States, that contract would not be enforced in the courts of this country; but none would contend, that a contract between private citizens, for the loan of the money when put in circulation, would be declared void by our courts; yet that is a case strictly analogous to the one in hand. If the Confederate States government, during its existence, had made a contract with a private person to carry cotton abroad, and exchange it for gold, and bring the gold thus procured to that government, in order that it might be used in the prosecution of the war against the United States; such contract would be repudiated by the courts of the United States. But, if the Confederate States had used the gold, after receiving it, in such form or packages as to be susceptible of identifi-

cation, who would contend that contracts between private citizens, made upon the basis thereof, would be void? Yet it is difficult to conceive of an objection made to the contract in this case, which might not be made in that.

A very strong case, involving the point of controversy which we are handling, arose and was decided in the supreme court of North Carolina, at its June term, 1867. The case is *Philips v. Hooker*, and will be found on page 194 of the North Carolina Reports of that term. In that case, there was a bill for the specific performance of a contract for the sale of land, made in 1862. The defense was put upon the ground, that the consideration of the contract was the payment of Confederate treasury-notes. The three learned and able judges of the court delivered their opinions *seriatim*, and each concurred in maintaining the validity of the contract, and the legality of a decree for specific performance. We quote at length from the opinion of Chief-Justice Pearson, as follows: "It is said, that every dealing in Confederate treasury-notes gave them credit and circulation, and consequently aided the rebellion; so every such dealing was illegal, and not fit to be enforced by the courts, without reference to the intent of the parties. The proposition is general—every man and woman, who, in the ordinary course of business, received a Confederate note, did an illegal act tainted with treason. It embraces all contracts, as well contracts executed as executory; for, if true as to one, it is also true as to the other; and it aims a blow at all dealings among our people during the war, and upheaves the foundations of society. I do not believe the proposition can be maintained by any authority, or any principle of law. It may be conceded, that if, at the outbreak of an insurrection, parties to contracts, *with a view of aiding the cause*, by giving credit and circulation to its paper, receive it as money in their dealing, such contracts are illegal. But that is not the case under consideration. In 1862, the contest had assumed the magnitude and proportions of war; each party, in territorial limits, had the boundaries of a mighty nation, and each party counted its people by millions. The Confederate States

was recognized by the nations, and by the United States itself, as a belligerent power, entitled to the rights of war; and in the exercise of its powers, it had issued paper, as the representative of money, which excluded all other currency, and constituted the only circulating medium of the country. The government of the United States was unable to protect the people, and there was no currency but Confederate treasury-notes. In this condition of things, was every man to stop his ordinary avocations, and starve, or else be tainted with treason, and deemed guilty of an illegal act, if he received a Confederate treasury-note? * * * * * Was a judge to cease to do those duties required by the interests of humanity, the performance of which can never be considered as criminal; or was he to perform the duties, and starve, rather than commit an illegal act by receiving his salary in Confederate treasury-notes? Was the merchant to close his store, the blacksmith and shoemaker to quit work, and the farmer to let his tobacco and surplus grain rot on his hands, and allow his family to suffer for clothing, and the other necessities of life, or do an illegal act by receiving Confederate notes? Really, unless the receiving of such notes can be connected with a criminal intent to aid the rebellion, the question seems to me too plain to admit of argument. A naked statement exposes the absurdity of the proposition. The courts must act on the presumption, that Confederate notes were received in ordinary dealing—not for the purpose of aiding the rebellion, but because there was no other currency. * * * * * It cannot be held that the mere receiving a Confederate note was illegal and base, without involving in the imputation of baseness every man and woman in the State. The minister of the gospel, the judge who received his salary, the physician, the merchant, the mechanic, the farmer, who carried on his ordinary business, the poor seamstress, who at the end of the day received her hard-earned wages—were all guilty of an act so base, that the doors of the courts of justice must be shut against them! The proposition is monstrous!"

This long extract is so sensible and so valuable as to justify its production. It may be said, that the use of Con-

federate treasury-notes, however innocent it may have been, was, *per se*, violative of the policy of the United States. We have quoted so extensively from the opinion of Chief-Justice Pearson, on account of its forcible exposition of the absurdity of this proposition. The use of such notes was a necessity, unavoidable, and universal. Every social, moral, and religious interest depended upon the yielding to this necessity. Humanity itself demanded the same thing. To attribute to the United States a policy and intent opposed to the use of such currency, would visit upon it the stigma of antagonism to humanity and every interest of society in all its gradations. Obedience to a *de-facto* government is tolerated in the law, upon the sensible theory, that the rightful government would prefer such obedience to the prevalence of lawlessness and social chaos.— *Watson v. Stone*, (40 Ala.) and authorities cited. Surely, for a like reason, a humane government would prefer a submission to the use of the currency prescribed by the government actually dominant, to the dreadful consequences which would result from the opposite course; consequences which even human nature could not endure. Humanity and civilization would be shocked by the fixing of a stigma upon obedience to a necessity, which bound and fettered the will by an inexorable power. Obedience to this necessity was rendered cheerfully or reluctantly, according as the cause of the Confederate government was or was not favored; but, in every case, such obedience was unavoidable.

4. The scaling the mortgage's debt, to the value of Confederate treasury-notes, it is contended, is authorized by the ordinance adopted the 28th September, 1865.— Revised Code, p. 59. The third section of that ordinance is in the following words: "In all suits upon contracts made between the first of September, eighteen hundred and sixty-one, and the first of May, eighteen hundred and sixty-five, parol evidence shall be admissible to prove what was the consideration thereof, and whether or not the parties thereto understood or agreed that the same should be discharged by a payment in Confederate currency or treasury-notes; and if so, or if it appears so from the contract, then to show what was the real or true value of the consideration

of said contract, and what amount the plaintiff is legally, justly, and equitably entitled to receive, according to the contract, by the judgment of the said court."

This ordinance should receive a liberal construction, in furtherance of the purpose of justice, which its framers contemplated. So construing it, and, in a slight particular, postponing the letter to the intent, we hold that it applies to a suit in equity for a redemption, and that under it there may be an ascertainment, upon the plan prescribed, of the amount due the mortgagee, although not technically a "*plaintiff*."

5. A careful reading of the above copied section of the ordinance will convince any lawyer, that a reduction of the debt is not authorized merely because the consideration was Confederate money; but that it is necessary that there should have been an understanding or agreement that the debt should be discharged in Confederate currency or treasury-notes. Thus understood, the ordinance does not impair the obligation of contracts; but it simply removes a rule of evidence, which the cautious policy of the law interposed to prevent the ascertainment of the contract, in so far as it existed in parol.—*Woodfin v. Slunder*, Phil. N. C. Law Reports, at January term, 1867, p. 200.

The complainant in this case has promised to pay so many dollars. This purports, upon its face, to be a contract for the payment of constitutional money. To modify this contract into a promise to pay Confederate money, it is requisite that an agreement or understanding, either express or implied, should be shown for the payment in such money, either by positive testimony, or by circumstances. Has the complainant shown that fact? The bill alleges, that the complainant was to return Confederate money, and that the interest for the year, at the expiration of which the debt would be due, was to be paid in a chattel, which the complainant alleges he delivered. The oath of the defendant to the answer was not waived, and the answer is made on oath. The defendant, in his answer, in strict response to the allegation of the bill, denies that the payment was to be made in Confederate money, and asserts the contrary. He also denies that the interest was paid in

the chattel, and asserts that the chattel was a present, and that the postponement of payment without interest was because of the loan in Confederate money, and because there was an understanding that the payment was to be made, six months after the close of the then pending war, in current money. The complainant cannot have the benefit of the alleged fact, thus denied, unless he has overcome the answer by the testimony of two witnesses, or of one with corroborating circumstances. The only proof controverting the denial of the answer is the great depreciation of Confederate money at the time—eleven or twelve dollars of it being worth no more than one dollar in gold. The force of this testimony, and the strong deductions which may be drawn from it, cannot be denied; and we do not intend to decide what effect such testimony, standing alone, should have. On the other hand, however, the defendant explains by his testimony that the complainant borrowed the money to enable him to consummate the purchase of a house and lot; and the testimony conduces very strongly to show that the price at which the purchase was made did not exceed its value in specie. This testimony, thus showing that the complainant could and did make the Confederate money borrowed available to the value of specie, very greatly lessens the improbability and unreasonableness of his giving a note payable in constitutional currency, for the loan of Confederate money. With this view of the testimony, it cannot be concluded that the positive denial of the answer is overcome by the equivalent of the testimony of two witnesses, or of one with corroborating circumstances. The complainant therefore fails to establish the agreement or understanding, that the note should be paid in Confederate money; and he was, therefore, not entitled to a reduction of the note.

There are other points made by the counsel on both sides; but there are none of them affecting the conclusion attained by us, which we consider sound, or which we deem it important to notice. We think the allegations of the bill are sufficient to authorize a redemption by the complainant, upon the payment of the debt of four thousand dollars, with interest from its maturity, and also for a per-

petual injunction of the action at law upon the consummation of the redemption. That proceedings may be had in the court below conformable to this opinion, the cause is remanded.

Reversed and remanded.

BYRD, J.—Appellee, in 1863, borrowed of appellant four thousand dollars in Confederate treasury-notes, and executed a promissory note, and a mortgage upon a house and lot in the city of Mobile, to secure the payment of the debt thus contracted. Appellant, after the law-day of the mortgage, brought a suit to recover the house and lot therein conveyed; and appellee, thereupon, by a bill in equity, sought to enjoin the suit, and a cancellation of the note and mortgage, on the ground that the consideration of the note and mortgage is illegal; or, if the court should consider him bound on the note and mortgage, then to redeem the premises conveyed, upon the payment of such sum as may be due; and in this event he insisted, that he ought not to be required to pay more than the value of the notes borrowed at the date of the transaction. The court made a decree in conformity to the alternative prayer of the bill, allowing *appellant* the value of the notes borrowed, with interest thereon. This presents the leading features of the case.

The question, whether the loan of the treasury-notes issued by the *late* Confederate States, to circulate as money, is a legal consideration, is one of no inconsiderable magnitude and perplexity. I have heretofore dissented from opinions of the court, delivered upon questions having their origin in the transactions which took place in the State during the late civil war, and especially as to the validity of the legislation and of such transactions, founded on Confederate States bonds and notes, without expressing, in writing, the grounds of dissent; but reserving the right to do so on some future occasion. I see proper to present my views on these topics, in this case, as it involves a question as general in its bearings as any which has come before us for adjudication.

I deem it appropriate and expedient, in the investigation

and exposition of the general subject under consideration, to make a concise and comprehensive analysis of the elements or primary principles of the peculiar (if not anomalous) form and structure of our State and national governments.

The American Colonies, in 1776, prior to the declaration of independence, were under separate, and, as to each other, independent colonial governments; yet, all under the united power and control of the empire of Great Britain. That declaration uses the language, "that these *united* colonies are, and of right ought to be, free and independent States." The articles of confederation of 1777 declare, that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in congress assembled;" and in article XIII, "that the articles shall be inviolably observed by the States, * * * and that *the union shall be perpetual.*"

The framers of the constitution of 1787 clearly recognized the sovereignty of the States; and that under the constitution the United States government would be clothed with sovereignty. Mr. Mason, of Virginia, speaking in convention of its effect upon the State and general governments, said: "The United States will have a qualified sovereignty only. The individual States will retain a part of the sovereignty."—Madison Papers, p. 1373. Mr. Ellsworth said, that "the United States are sovereign on one side of the line, dividing the jurisdiction; the States on the other." The correctness of these views was never questioned in the convention.

While the adoption of the constitution by the States was pending, Alexander Hamilton, who was a firm and avowed advocate of a strong national government, wrote as follows: "The proposed constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the senate, and leaves in their possession certain exclusive and very important portions of *the sovereign power.*"—Federalist, (ed. of 1831,) p. 44. On page 151 he says: "But, as the plan of the convention aims only

at a partial union, or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." On page 192, Mr. Madison says : " In this relation, the proposed government cannot be deemed a *national* one ; and leaves to the several States a residuary and *inviolable* sovereignty over all other objects." Mr. Adams, in his inaugural address of the 4th of March, 1825, said : " That the general government of the Union, and the separate governments of the States, are all sovereignties of legitimated powers ; fellow-servants of the same masters, uncontrolled within their respective spheres, uncontrollable by encroachments upon each other." President Jackson, in his proclamation of the 10th of December, 1832, said : " The States severally have not retained their entire sovereignty. It has been shown that, in becoming parts of a nation, not members of a league, they surrendered many of their essential parts of sovereignty ;" and in his farewell address, he says : " Every friend of our free institutions should be always prepared to maintain unimpaired, and in full vigor, the rights and sovereignty of the States, and to confine the action of the general government strictly to the sphere of its appropriate duties."

The supreme courts of the respective States, and of the United States, have uniformly held the same doctrine ; and I shall refer only to a few adjudications of the latter. In the case of *Buckner v. Finley & Van Lear*, (2 Peters, 591,) Washington, J., in delivering the opinion of the court, quoted approvingly from the opinion in the case of *Warder v. Arrell*, (2 Wash. R. 298,) as follows : " The same principle applies, though with no greater force, to the different States of America ; for, though they form a confederated government, yet the several States retain their individual sovereignties, and, with respect to their municipal regulations, are to each other foreign." In the case of *The State of Rhode Island v. The State of Massachusetts*, (12 Peters, 720,) where the question came up for adjudication, Baldwin, J., in announcing the opinion of the court, said : " Before we can proceed in this cause, we must therefore inquire, whether we can hear and determine the matters in contro-

versy between the parties, who are two States of this Union, sovereign within their *respective boundaries*, save that portion of power which they have granted to the Federal government, and foreign to each other for all but Federal purposes. So they have been considered by this court, through a long series of years and cases, to the present term; during which, in the case of *The Bank of the United States v. Daniel*, (12 Peters, 54,) this court has declared this to be a fundamental principle of the constitution; and so we shall consider in deciding on the present motion." See, also, *The Bank of Augusta v. Earle*, 13 Peters, 590; *License Cases*, 5 Howard, U. S. 504.

I am not aware of any adjudications at variance with those referred to, upon this question; and they firmly establish the proposition, *that the States, within their respective boundaries, are sovereign, but limited by the powers granted to the Federal government by the national constitution.*

In determining to what extent the sovereignty of the States was limited, and the extent of the powers and sovereignty conferred on the Federal government, by the constitution, it is just and proper to consult the lessons of contemporaneous history, the wisdom and opinions of the sages who constructed that charter of our national existence and liberties, and the learning and judgment of the jurists and publicists of those and subsequent times.—12 Peters, 720. The great difficulty which seems to have perplexed the conventionists, was, how to clothe the Federal government with certain supreme, sovereign powers, without bringing it, in its operations, into collision with the State governments, and thereby finally causing the overthrow of the one or the other. *An imperium in imperio* seems to me to be a political anomaly. Yet we have a government, which has been thought to be appropriately characterized by the phrase, *E pluribus unum*. It is different in form and construction from any other known to history. It may, in some of its prominent features, resemble the Achean League, the Republic of Switzerland, the Germanic Confederation, and the Dutch Republic; yet, it is clearly distinguishable from any government where the common law, which is the basis of our jurisprudence, has ever pre-

vailed. I am left, therefore, in exploring the field before me, without precedent or adjudication, applicable to a state of facts which have made their appearance, within the last six years, during a civil war between the general government and a portion of the States, or the people thereof, as to the questions hereafter discussed.

The extent of the limitation of the sovereignty of the States, and of the powers conferred on the general government, must be determined by the provisions of the constitution, subjecting them to the light afforded by the principles of the common and international law. The citizen, under our form of government, is bound to support two constitutions and sovereignties—the State and national. The Divine declaration must be true, “No man can serve two masters; for he will either hate the one, and love the other, or else he will hold to the one, and despise the other.” Hence, it results, that one should be supreme, in order to ensure peace, unity, and safety, and to prevent discord, anarchy, and their attendant train of evils.

I proceed to the consideration of the provisions of the constitution, to ascertain what powers were actually conferred on the Federal government, and how far the sovereignty of the States was limited thereby, so far as it is necessary to do so for the purpose of deciding the questions hereafter passed upon in this opinion. It seems to me to be evident from the provisions of the constitution, and the discussions in convention, that it is binding upon the States *as sovereignties*; but the general government must enforce its powers and authority by acting directly on the people, and not upon the States. This distinction between a State and the people thereof, is one made by the convention, and has come down to our times. I shall not attempt to show that there is, or is not, a difference between them, which does or does not authorize the distinction. If the national government requires the States, or any one of them, to perform any duty, there is no way for it to compel the State to perform it. It must execute its laws, not on the State, but upon the people thereof. The constitution has required of the States the performance of certain duties, which are necessary to the perpetuation of the govern-

ment in its constitutional orbit; such as the election of senators. Yet, if any or all of the States should decline to make the election, there is no power in the national government to compel the States to make it; and so of other duties. It would seem that the founders of our government, in framing the constitution, acted upon the presumption, that such a government and constitution could only be harmoniously and judiciously administered by patriotic and honest men; and that, when they ceased to be so, they would cease to be worthy of, or capable to conduct, a free and constitutional government; and they therefore did not attempt to provide for such a contingency. It was left to be solved by the inexorable logic of events and human necessities.

The second clause of the sixth article of the constitution, is the principal one which declares and asserts the supremacy of that constitution, and the laws passed in pursuance thereof, over State constitutions and laws; and reads as follows: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, *anything in the constitution or laws of any State to the contrary notwithstanding.*" Accepting the constitution and the laws made in pursuance thereof as the supreme law of the land, and the sovereignty of the States as limited thereby, the difficulty of determining when the State and national governments are acting within their allotted orbits, *remains*. But, when the laws of the latter are ascertained to be constitutional, they are, at least then, the supreme law of the land. There is, or may be, a class of laws enacted by the States, which may not be a violation of the *letter*, but of the *spirit or policy* of the Federal constitution; and which, when construed in connection with the article which provides that "The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," is suggestive of questions difficult of solution. The Federal judiciary are apt to incline in favor of maintaining the con-

stitutionality of the laws of the United States and the powers of that government; and the State judiciary are as likely to incline in favor of the rights and powers of the State. In such a conflict, under the provisions of the 6th article of the constitution, the State judiciary must conform its opinion to that of the national, when known. But, when unknown, the former must act upon its own judgment, after a thorough investigation of the subject.

It has been shown that, by the articles of confederation of 1777, the Union was declared *to be perpetual*. The constitution of 1787 was formed for the purpose of remedying the supposed defects of the articles of confederation; and the preamble declares, that "we, the people of the United States, in order to form a more perfect union, * * * and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America." This seems to me persuasive if not decisive, to show that the perpetuity of the Union, and the liberty of the people were the main objects to be accomplished by the substitution of the constitution for the articles of confederation. If the latter declared the Union *perpetual*, the framers of the former, in establishing "a more perfect union," did not assail the perpetuity of the Union; on the other hand, if the union of the States, and the liberties of the people, were objects worthy of preservation and perpetuity, they, instead of impairing the bond which bound the Union together, and thereby endangering its existence, *intended*, by strengthening, to make it more perfect and enduring, *and, if possible, perpetual*. They never designed to *legalize* the power of self-destruction, nor leave its exercise either to a part or the whole of the States. The supremacy of the constitution of the United States, and the laws passed in pursuance thereof, is inconsistent, and, in my judgment, wholly irreconcilable with the right of State secession.

The dissolution of a government is a matter of the most serious import. It can not be effected with the facility of that of a league, or partnership, nor with such harmless consequences. The fourth section of the fourth article requires "the United States to guaranty to every State in

this Union a republican form of government." Without attempting to give my view of the proper interpretation of this clause, it seems to me that, if a State has the right to secede, it could defeat the object of this clause, and render it wholly nugatory. Constitutions are formed, as much for the protection of the few, as the many. The latter, in a free country, are usually *disposed*, and *strong* enough, to take care of themselves; and those instruments are intended to prevent and restrain the oppression of the few by the many. The rights of a minority were never intended to be left at the mercy of the majority, by the authors of our government. A minority of the people of a State can not be deprived of their rights, secured by the constitution of the United States, by any *lawful* act of a State, or of the United States.

Having carefully and for a long time considered and investigated this subject, giving due weight to the sovereignty of the States and the provisions of the Federal constitution, I have come to the conclusion, that the doctrine of State secession is not maintainable, and that the grounds upon which it is sought to be established are at war with the constitution in other respects than those hereinbefore designated. *If a State had the right to secede, all or any portion had the same right, and the further right to form such a government as the Confederate States; and if so, then that government had a right to issue treasury-notes to circulate as money, and a contract based on it would be valid by the common law, and the law of nations, and the constitution of the United States could have no effect on the contract.* But, as the State had no right to secede, the national constitution, in contemplation of law, as hereafter shown, was in force over the whole country during the late war, and all contracts must be based upon a consideration, not in contravention of the policy or constitution of the United States, in order to be enforceable in the courts.—*Kennett v. Chambers*, 14 Howard, 38.

Section ten of the second article is prohibitory, and provides, that "no State shall enter into any treaty, alliance, or confederation." This is explicit, and conclusive. It is further declared, that "no State shall emit bills of credit,

make anything but gold and silver coin a tender in payment of debts," and that "no State shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in times of peace, enter into any agreement or *compact with another State*, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." These provisions, in my judgment, were applicable to the insurgent States during the late war. If they had succeeded in maintaining their ordinances of secession, and had established their separate existence as a nation, then their courts would have held, that their independence related to the dates of their respective ordinances, and that all transactions subsequent thereto were freed from the influence of the constitution and laws of the United States, and must be tested by the laws of the seceding States.—*McIlvaine v. Cox's Lessee*, 4 Cranch, 211. But, having failed, the rule hereafter announced must prevail. Under the last cited provisions of the constitution, the compact or constitution of the confederation of the seceding States is a nullity. No act of a State prohibited by the constitution can be held by the courts to be valid. And that compact or constitution can not be looked to for the purpose of validating anything, much less anything in contravention of the policy of the general government; and, as treasury-notes were issued by this confederation to pass as money, and, if anything, were "bills of credit," they must be held to have been issued in violation of the constitution, and therefore illegal; and this, though the Confederate States were entitled to the rights of belligerents by the *jus gentium*. These notes were made payable after the ratification of a treaty of peace between the belligerents, and will therefore never be payable, and if they ever could be, there would be no one to pay them; and, if the Confederate States had been authorized as a government *de facto*, and as the States have been decided to be, to charter banks and issue notes to circulate as money, yet they could not issue them payable at a future indefinite day, without doing so in violation of the constitution of the United States; and, if we were permitted to look be-

yond, *even*, perhaps, in violation of the constitution of the late Confederate States.

Paper, or notes, issued in violation of the constitution, to circulate as money, can not be a consideration to support an executory contract founded on it.—*Craig et al. v. The State of Missouri*, 4 Peters, 410; *Bryan v. The State of Missouri*, 8 Peters, 40. These cases are familiar to the bar and bench, and no further reference to them is necessary. And the fact that such contract is made with the State issuing such paper or certificates, or with a person who obtained them from such State, or from any source, in my opinion, makes no distinction in the applicability of the principle. Besides, the circulation of such paper is as illegal as its issuance, and equally against the policy of the United States. Such notes were issued for the purpose of maintaining and prosecuting hostilities against the national government, and, but for their circulation by the people, would have been worthless. That circulation alone made them effective for the purpose for which they weré issued. Hence, all persons who gave them circulation, must be held to have been *in pari delicto* with the issuer; and upon principles settled by the following authorities, and those cited above, I hold that *the loaning* of Confederate treasury-notes during the war was illegal, and the borrower can avoid the contract when sued upon it.—*Yeates v. Williams*, 5 Ark. (Pike,) 684; *Wils v. Hendrix*, 9 Moore, 586; 2 Bing. 314; *Jones v. Randall*, Cowper, 39; *Cope v. Rowland*, 2 Mees. & W. 149; 2 Gale, 231; *Walker v. Chapman*, Lofft. 342; *Grissari v. Clement*, 3 Bing. 432; 11 Moore, 308; 2 Car. & P. 223; *McGregor v. Lowe*, 1 Car. & P. 200; *Thompson v. Powles*, 2 Sim. 194; *Lowes v. Mazzaredo*, 2 Eng. C. L. Rep. 385; *Birch v. Jervis*, 14 Eng. C. L. Rep. 619; *Fisher v. Bridges*, 72 Eng. C. L. Rep. 641; *United States v. Turner*, 2 Peters, 132; *Smith v. Bromley*, Dougl. 670, and note; *Baley v. Tabor*, 5 Mass. 286; *Mitchell v. Smith*, 4 Dallas, 269; *Laudeler v. Andrews*, 2 McLean, 464; *Merrill v. LeGrand*, 1 How. (Miss.) 150; *Cowen v. Boyce*, 5 How. (Miss.) 769; *Downing v. Ringer*, 7 Mis. R. 585; *Hale v. Henderson*, 4 Humph. 199; *Milne v. Huber*, 3 McLean, 212; *Wooten v. Miller*, 7 S. & M. 380; *Adams v. Rowan*, 8 S. & M. 624; *Howell v. Fountain*,

3 Kelly, 176; *Smith v. Barstow*, 2 Dougl. 155; *Orr v. Lacey*, 2 Dougl. 230; *Stebbins v. Leowoolf*, 3 Cush. 137; *Spalding v. Preston*, 21 Vermont, 9; *ib.* 184, 199, 456; *Leavit v. Blatchford*, 5 Barbour, 9; *Smith v. Godfrey*, 8 Foster, (N. H.) 379; *Buck v. Albee*, 26 Vermont, 184; *Barton v. P. J. & W. F. P. Railroad*, 17 Barbour, 397; *Odineal v. Barry*, 24 Miss. 9; *Kennett v. Chambers*, 14 How. (U. S.) 38; *President, &c., v. Spalding*, 12 Barbour, 302; *McGregor v. Railway Company*, 16 Eng. C. L. Rep. 180; *Railroad Co. v. Faunce*, 6 Gill, 68; *Bates v. Watson*, 1 Snead, 376; *Spinks v. Davis*, 32 Miss. (3 George,) 152; *Fire Ass. v. Berghaus*, 13 La. Ann. 209; *Summerlin v. Livingston*, 15 La. Ann. 519; *Hill v. Mitchell*, 25 Geo. 704; *Bless v. Brainard*, 41 N. H. 256; *Smith v. Pinney*, 32 Vermont, 282; *Guenther v. Devien*, 11 Iowa, 133; 12 Iowa, 398; *Weeks v. Lippincott*, 42 Penn. 474; *Br. Bank v. Crocheron*, 5 Ala. 250; *McGehee v. Powell*, 8 Ala. 827; *Tenison v. Martin*, 13 Ala. 21; *Stanley v. Nelson*, 28 Ala. 514; 1 Parsons on Contracts, 380-82; *Dial v. Hair*, 18 Ala. 798; *Tannis v. Doe*, 21 Ala. 449; *Atwood's Heirs v. Beck*, 21 Ala. 590; *Petit's Distributees v. Petit's Adm'r*, 32 Ala. 288; *Cothran v. McCoy*, 33 Ala. 65; *Evans v. Kittrell*, 33 Ala. 449; *James v. Hendree*, 34 Ala. 488; *Smith v. Johnson*, 37 Ala. 633; *Martin v. Reed*, 37 Ala. 198; *Webb v. Kelly*, 37 Ala. 333. It would extend this opinion too much to attempt a review of these cases.

I proceed to lay down some general propositions, which may aid in the solution of the questions arising out of the transactions of the last six years. Whatever may be our several opinions, as to the best mode of settling those questions, so as to mete out the greatest good to the community, and approximate nearest the attainment of justice, and harmonize the variant and conflicting interests of individuals and society; still, we are not permitted to indulge our personal wishes, sympathies, or predilections, but must be guided and conducted to our conclusions by the well-established principles of law. As judges, we can know no justice, nor administer any, but what is the result of the stern and inflexible mandate of the law; and even then we can never attain to the administration of exact justice, but only approximate it, which is the most that can be done in our

present imperfect condition. Such, too, is the nature of wrong, that it is impossible for human tribunals to adjust with exactitude the remedy, and make one the equivalent of the other. Courts are not responsible for the consequences which flow from the correct application of the principles of law to facts and events over which they have no control.

I. The first proposition is, *The national government is one of delegated sovereign powers, and that they were delegated by the people of sovereign States ; which they had the right to delegate, and to retain the remainder to themselves.*

II. *That, as to the sovereign powers delegated to the Federal government, it is supreme over the States and the people thereof.*

III. *That the States, in their sphere of action, are sovereign; and, to that extent, independent of the control of the national government ; independent, but in a limited sense. The framers of the constitution were too wise to suppose, that, even as to the sovereign powers of the States, such independence would not be more a matter of theory than of substance, when they made "the constitution, and laws made in pursuance thereof, the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding."*

Whenever the laws of the State and Federal government conflict, the former yields. Such has been the practical working of the system. But it is said, that this should be so only when the national constitution, and laws made in pursuance thereof, are irreconcilable with the constitution and laws of the State. Who is to determine the question between them? I answer, the courts, and, as a final judicial tribunal, the supreme court of the United States, if they have jurisdiction under the constitution ; and if not, the State must yield ; for *the action of individual citizens and State authorities must be based upon the presumption, that all laws of the United States are constitutional, until they are decided by the courts not to be so.* It may be asked, if the legislative authority of the several States have not the right to decide for themselves the extent of the powers and sovereignty of the States, and also of those conferred on the

general government. I answer, they certainly have ; but it is not *exclusive* of, nor *conclusive* on, the courts or the national government. They have no right, in my opinion, by their action to nullify the laws of congress, or to enforce their own laws in defiance of the laws of congress, until the courts have pronounced the laws of congress unconstitutional. Any other view, it seems to me, would lead to constant feuds, and end in anarchy and revolution.

IV. *When the State and national governments, in the exercise of their respective powers, come in collision, each has the right to determine the extent and scope of its own powers, until the matter of difference is settled by the supreme court of the United States, if it has jurisdiction under the 3d article of the constitution ; and if it has not, then there is a case in which no judicial remedy is provided by the constitution.* This proposition must be understood as qualified by the one next preceding, and the comments made thereon ; from all which, the necessary and rational conclusion is, that when a question of power arises, the State must yield its right to enforce the obedience of the citizen to its own decision, until a determination in its favor by the supreme court of the United States ; and if that court has no jurisdiction over the matter, then the *only* appeal is to the ballot box, or a resort to the inalienable rights promulgated by the declaration of independence, *that ultima ratio* of a people determined to be free, and worthy to be so.

While I hold that a State has no right to secede from the Union, it seems to me that the constitution has prohibited the general government from invading a State ; and this opinion is founded on the fourth section of the fourth article. But, at the same time, I hold that the general government has the constitutional power to enter *the limits* of a State, by its officers or armies, to enforce on the people thereof the constitutional laws of congress. Without this power and right, the Union would be impotent to enforce an observance of its laws. A right to *invade* a State, involves a right to conquer or subjugate it, which the general government has no constitutional power to do. I use the words *invade* and *State* in the sense in which they are used by the writers on the laws of nations. To enter *right-*

fully, with an army, to enforce laws, is not an invasion of a State by the general government, within the meaning of the article of the constitution last referred to.

V. *The States did not forfeit their sovereignty by the attempt to secede, and the consequent civil war; and they continued during the civil war, States de jure; and under the national constitution, their existence and sovereignty were inviolable.* Inviolable, because the general government had no constitutional power to destroy the one, or to impair the other. There is no principle of the common law, or international law, which would operate a divestiture of the limited sovereignty of the States, on account of the exercise of the supposed right of secession, and their consequent attitude of armed hostility. The constitution imposes no such penalty or forfeiture. If the States had obtained their sovereignty from the national government, then there might be some plausibility in the position, that they had subjected themselves to a forfeiture of their sovereignty thus obtained, by their hostile and belligerent acts. *The indestructibility of the States cannot be constitutionally assailed by the national government.* The question, whether the officials of the insurgent States were such rightfully or wrongfully during the war, may arise in some other case, and should not therefore be anticipated; and it is not necessary to decide it for any of the purposes within the scope of this case. It seems to me, upon authority, that they were, at least, officers *de facto*.—*Heath v. The State*, 36 Ala. 274, and authorities therein cited; *Lowell v. Flint*, 7 Shep. 401; *Burke v. Elliott*, 4 Ired. 355; *Hooper v. Goodwin*, 48 Maine, 79. And it is well settled, that the rights and responsibilities of third persons remain the same, whether the functions of government are performed by officers *de jure* or *de facto*, however much their own might be affected by the distinction.—*Mayo v. Stonum*, 2 Ala. 390; *McKim v. Somers*, 1 Penn. 297; *People v. Collins*, 7 Johns. 549; 4 Iredell, 355; 3 Scam. 483; 48 Maine, 79; *Cuthbert v. Huggins*, 21 Ala. 349.

VI. *The State being such de jure, and sovereign, as shown herein, every act which it did, or authorized to be done, or which was done by the people thereof, during the war, must be held*

valid, unless such act was violative of the Federal or State constitution, or the policy of the government. This State, durante bello, being in contemplation of law within the Union, the constitution must be held to have been in force over its entire territory, as the "supreme law of the land;" and therefore—

VII. *The courts must enforce the constitution of the United States, by the application of its principles to transactions occurring within the State during the war.* Conceding, for the argument, that the sometime Confederate States government was one *de facto*, within or without the limits of a government *de jure*, (such as the United States,) still, having been overthrown and demolished by the latter, the national constitution must be now held to have been in force during the conflict of arms, and must control the courts in the determination of the rights of all persons affected thereby, though such rights arise from transactions within the State, taking place *pendente lite*.

The State and national governments are not separate, though distinct sovereignties—they are blended and interwoven into harmonious unity; yet, they are co-ordinate, if not co-equal authorities, united by a written constitution, which fixes their relative subordination and supremacy. In the case of *Rose v. Himely*, (4 Cranch, 241,) the chief-justice, speaking of the right of the people of St. Domingo to establish an independent government, said: "It is for governments to decide whether they will consider St. Domingo as an independent nation; and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting." If this must be done while the contest is pending, *a fortiori* it must after it is ended by defeat, and the entire restoration of the national authority. This doctrine is well sustained by reason, and upon authority.—*Dudley v. Folliott*, 3 T. R. 583; *Ogden v. Folliott*, *ib.* 726; *Gelston v. Hoyt*, 3 Wheaton, 946; *Kennett v. Chambers*, 14 How. 38; *The Prize Cases*, 2 Black's Rep.; Story on Conflict of Laws, §§ 244, 245, 246, and authorities cited

in the notes thereto; Wheaton's International Law, by Dana, pp. 77, 374, and notes.

St. Domingo was a colony of France, and Alabama is a State of the Union. This difference, in my opinion, can make no distinction as to the application of the principle. If it is not applicable, then we must adopt one which would allow us to enforce two distinct and belligerent codes of law within the same territory, repugnant to each other. In this matter, law and reason, as usual, are consistent. The party which fails in political revolutions or civil wars must not expect to give law to the successful party; but the latter has the right, and usually exercises it, to declare and enforce its own laws and policy. But such laws must be in conformity to the constitution and the principles of national law. No people, however powerful, has the right to violate or disregard these safeguards of the victors and the vanquished. The constitution confers no authority on the national government, to treat the late insurgent States, or the people thereof, as if they had been acquired or subjugated by conquest. They occupy the position of States and citizens reduced to submission and obedience to the laws of the national government over them.

VIII. *All executed contracts must be treated as finally closed, in the absence of fraud, although originally based on an illegal consideration.* Lord Kenyon, in the case of *Hawson v. Hancock*, (8 T. R. 576,) says: "There is no case to be found, where, when money has been actually paid by one of two parties to the other, upon an illegal contract, both being *particeps criminis*, an action has been maintained to recover it back again."—See, also, *Dixon v. Olmstead*, 9 Vermont, 310. This, as a principle, may be too broadly laid down. Upon authority, it seems, a party who has paid money on such a contract, unexecuted on the part of the other, may, before the latter executes it, treat the contract as a nullity, and recover what he has paid.—*Simpson v. Bloss*, 7 Taunt. 246; *Holman v. Johnson*, Cowper, 343; *Allen v. Riscomb*, 2 Lev. 174; *White v. Bank*, 22 Pick. 181; *Wheeler v. Russell*, 17 Mass. 281; *Shefner v. Gordon*, 12 East, 304; *Belding v. Pitkin*, 2 Caines, 149; *Bank v. Merrick*, 14 Mass. 322. And the principle, that money paid on an executed illegal

contract is not recoverable, has received the sanction of this court.—*Vide Black & Manning v. Oliver*, 1 Ala. 449; *Tindall v. Childress*, 2 S. & P. 250; *Sterrett's Ex'rs v. Kaster*, 37 Ala. 366.

IX. *A mortgage, given to secure the payment of a contract for the loan of Confederate treasury-notes, is founded on an illegal consideration.* The consideration of the note and mortgage being illegal, they must be held to be vitiated thereby, and therefore invalid as a security.

The consequences which may result from the doctrines announced, while it has made me more laborious in my investigations, should not deter me from announcing my convictions of the proper application of the doctrines to the anomalous condition of the country and the entangled web in which it is involved. Hardships will result, from *any* application made of those, or other principles, to recent events and transactions; and many have been borne by the country, more detrimental and disastrous than any which would take place, if the view I take of the law and its application were adopted.

I have thus given my views on all the points raised in cases which have been before us, and which are now pending, affecting the transactions which took place during the war, and the State legislation during the same time; and I shall not, therefore, make any further dissent from the opinions of the court in those cases, or such as may hereafter be presented, unless a new point is sprung, not covered by this opinion.

No demurrer was interposed to the bill, and the appellant has not, by the assignment of errors, or in argument, raised the question of the equity of the bill, on the ground that appellee was *particeps criminis* to the illegal transaction which he seeks to avoid. In this state of the case, and under section 2900 of the Code, and the decisions of this court, I am relieved from raising and passing upon that question. A court of equity has the jurisdiction to set aside and cancel a mortgage, and especially when it is being used to cast a cloud over the title of the mortgagee, who is in possession, to the land conveyed thereby.—*Lyon v. Hunt*, 11 Ala. 295; *Burt v. Cassety*, 12 Ala. 738; *Hunt*,

Frowner et al. v. Acre, Johnson et al., 28 Ala. 593. And a court of equity having jurisdiction over the subject-matter and the parties, this court will not, *ex mero motu*, as a general rule, dismiss the bill, on a ground which was not raised in the court below, nor insisted on in this court. I do not wish to be understood as intimating any opinion upon the validity of such an objection, if it had been raised in this court for the first time.

Having come to the conclusion, that the consideration of the mortgage is illegal, and that a court of equity has the jurisdiction to cancel it, or declare it void, it is unnecessary to notice the other questions so ably and learnedly argued by counsel; or to decide whether, in such a case as this, appellee should be held to do the same equity, as a party who resorts to a court of chancery, to avoid the payment of usurious interest, is required to do; for the court below has awarded the appellant all that could be legally claimed, by the enforcement of the rule alluded to, in cases of usury. Hence, if the court erred in the decree rendered, it did so without injury to the appellant; and consequently the decree should be affirmed.

This opinion was prepared by me as the decision of the court, the cause having been assigned to me; but my brethren, disagreeing with me, wrote another opinion, from most of which I dissent. I have not seen proper to change the draft of my original opinion, and conclude with the deprecatory citation: "What is *writ*, is writ,—*would* it were worthier."

NOTE BY THE REPORTER.—On a subsequent day of the term, in response to an application by the appellee's counsel for a re-hearing, the following opinions were delivered:

A. J. WALKER, C. J.—When this case was first argued, and when the opinions in it were prepared, the validity of executory contracts which were made during the late war, and which were predicated upon a consideration of Confederate money, was a material and important point of the case. The same question arose in other cases, which were under advisement contemporaneously with this. This

case was selected as the one in which to render opinions settling the question as it arose in other cases then before the court, or which might afterwards come before it. In adjudicating the question, my brother BYRD dissented, and my brother JUDGE concurred with me, in maintaining the validity of such contracts. Notwithstanding the difference among the judges in deciding the question, they were unanimous in regarding the decision, when made, as authority upon the point. Accordingly, in other cases, the question has either been passed *sub silentio*, or decided expressly upon the authority of this case. While Judge BYRD still entertains a conviction of the correctness of his opinion, he concurs with the other members of the court in treating the question as settled; and the court unanimously agree, that in considering the petition for a re-hearing, it should be regarded as adjudged upon authority, and as not now open for discussion.

Another point of dissenting opinion among the members of this court has been, whether debts contracted during the war could, consistently with the Federal constitution, be scaled, upon proof of an agreement, or understanding, that payment should be made in Confederate money. That question has been several times decided in the affirmative; and the judges of this court now unanimously regard the question as settled; the judge hitherto dissenting yielding to authority, without acknowledging any error in his convictions as heretofore expressed. Of course, in speaking of the questions as settled, it is not intended to deny the obligation of the court to change its position, in obedience to the authority of the supreme court of the United States, or to a change in the disposition of a majority of the court in reference to it. We therefore consider the petition for a re-hearing upon the hypothesis that those two questions are settled.

An argument in support of the petition for a re-hearing is made, maintaining that Scheible does not deny in his answer the allegation of the bill, that it was understood that payment was to be made in Confederate money; and that, if he does so respond, his answer is overcome by the requisite amount of testimony; and that, at least, it is so

discredited, as to deprive it of all weight as evidence. A majority of the court are of the opinion, that none of those propositions can be sustained. The bill alleges, that at the time when the Confederate money was received by complainant from the defendant, "it was understood that payment was to be made in like currency." The answer alleges, that before the execution of the note and mortgage, and immediately before the loan of the money, the respondent proposed to make the loan without interest, "provided said Bacho would agree to pay to respondent said sum of money, *in current funds*, six months after the war was over;" and that "Bacho distinctly agreed to this proposition," and thereupon received the money. The answer further states, that when the complainant proposed payment, the defendant told him that he knew the "contract between them was that the said sum of money was to be paid, six months after the war, *in current funds*;" and that he was to pay no interest. Afterwards the answer proceeds as follows: "Respondent denies that he ever proposed to lend money to said Bacho, except in the way before stated. He denies that the understanding was that said sum of money was to be returned in twelve months; but that it was to be paid as before stated, according to the *said agreement* entered into by and between said Bacho and respondent." In a subsequent part of the answer, the following language is used: "Respondent denies that it was agreed between said Bacho and respondent, when said sum of money was loaned, that payment was to be made in like currency." Argument can add nothing to the demonstration afforded to the inquirer by the foregoing extracts from the bill and answer, that the bill, upon the point of an understanding that payment should be made in Confederate money, is responded to, and contradicted by the answer. Upon this question, the answer must prevail, unless it is contradicted by two witnesses, or by one with corroborating circumstances.—*England & Lee v. Reynolds, Devoe & Co.*, 38 Ala. 370; *Easterwood v. Linton*, 36 Ala. 175; *Garrett v. Garrett*, 29 Ala. 439.

Furthermore, the answer must prevail over the testimony of one positive witness, unless that witness is supported

by corroborating circumstances, which, when disconnected from the evidence of the witness, would tend to establish those charges which are denied by the answer, and which would, of themselves, be evidence for that purpose.—*Beene v. Randall*, 23 Ala. 514. An answer is not outweighed by proof of facts which are not irreconcilable with its truth and the fairness of the matter stated, especially when each material fact is stated only by a single witness.—*Branch Bank at Decatur v. Marshall*, 4 Ala. 60. An answer is not discredited, unless it is proved to be false in a material matter, by the requisite degree of evidence.—*Pharis v. Leachman*, 20 Ala. 662.

If it is observed, that the witness Conway was present at the time when the note and mortgage were executed; and that the loan of money, and the verbal agreement or understanding as to the time of payment and currency in which payment was to be made, of which defendant speaks, was entered into previously, and on a different occasion; it will be obvious that Conway's testimony is not opposed to any *material* statement of the answer. With this single remark, we leave the question, whether the evidence, which will be set out *by the reporter*, overcomes or discredits the answer, according to the principles above set forth. We do not think the answer is overcome, or discredited; but we will not farther discuss the question.

The complainant sets up a parol agreement, or understanding, variant from the written instrument. The *onus* of showing it is upon him. In determining whether the answer is discredited, the entire scope of its statement, upon each subject, should be considered. It should be observed, that the answer alleges that the agreement was made under respondent's expressed belief, that the war could not last more than six months. If the expectation that the war would continue for only six months was realized, the understanding that payment should be made six months after the close of the war, would have been substantially carried out by a note payable in twelve months.

The petition for a re-hearing is overruled.

JUDGE, J.—I concurred in the opinion as first deliv-

ered in this case by the Chief-Justice ; and I still concur in that portion of it relating to the validity of executory contracts, of which Confederate money was the consideration. And on the application for a re-hearing, I am opposed to a disturbance of that part of the original opinion, which settles the question as to the validity of such executory contracts. Indeed, the application for a re-hearing does not seek to disturb our decision of that question ; but is predicated exclusively upon the ground, that the original opinion is erroneous in this, to-wit: in holding that the evidence, under the pleadings in the cause, is not sufficient to show that it was the express or implied understanding between the parties, at the time the money was loaned, and the bond and mortgage executed, that the money which was loaned in Confederate currency, was to be paid in the same currency. A more careful examination of the record, since the application for a re-hearing has been made, has resulted in a thorough conviction on my part that the original opinion is wrong, as to this point, and that it should be changed. I shall proceed to state, briefly, the reasons for my conclusion.

It is averred in the bill, that on the 20th of October, 1863, the complainant Bacho borrowed of the defendant Scheible four thousand dollars in Confederate States treasury-notes, with the understanding that it should be returned in twelve months ; that pursuant to agreement between the parties, Bacho, in consideration of the loan, executed his promissory note to Scheible for the sum of four thousand dollars, bearing date the 20th of October, 1863, and made payable on the first day of November, 1864, and also a mortgage on certain real estate in the city of Mobile, of the same date as the note, to secure the payment thereof according to its tenor and effect. It is further averred in the bill, that the estimated value of Confederate money, at the time of the loan, was twelve dollars in said currency for one in gold or silver coin ; "that at the time it was received, it was understood that payment was to be made in like currency;" that for the use of the money Bacho was to pay to Scheible "one barrel of lard, which, according to its then valuation, was more than lawful interest on the

money loaned ;" and that at the maturity of the note, Bacho tendered Confederate money in payment thereof, according to the contract ; and that Scheible refused to receive it. These are, in substance, the allegations of the bill bearing on the question under consideration.

Scheible admits, in his answer, that the money loaned was Confederate treasury-notes ; but says it was the agreement that the loan was to be without interest, and that the sum was to be returned to him "in current funds, six months after the war was over, meaning the war between the United States and the Confederate States." He admits the execution of the note and mortgage by Bacho, but says he "is a foreigner by birth, and could not write the English language, nor read it understandingly;" that he "did not read the note and mortgage, nor was either read to him;" that he received the note and mortgage, and had the mortgage recorded ; and that he "*supposed they were drawn according to the agreement.*" He denies "that the understanding was that said sum of money was to be returned in twelve months," but says "it was to be paid, as before stated, according to the said agreement entered into by and between said Bacho and himself." "He denies that he was to receive, or did receive, one barrel of lard for the use of said sum of money for twelve months, or any other time;" but admits "that, some time after said sum of money was lent as aforesaid, said Bacho made him a present of one hundred and forty pounds of lard ;" and he denies that it was agreed between said Bacho and himself, "when said sum of money was loaned, that payment was to be made in a like currency." These are believed to be the material allegations of the answer, relating to the question under consideration.

Now, the answer denies that it was "*agreed*" when the money was loaned "that payment was to be made in a like currency." The bill says, as will be seen, not that such was the *agreement*, but that such was the "*understanding*" between the parties. The answer, therefore, instead of being an express denial of the allegation of the bill in this respect, is *evasive*—is, at best, but an *evasive denial*. But, admitting for the purposes of the argument that the answer

does directly deny the allegation of the bill in question, still, the rule is, that when an answer is responsive, *if it be contradicted, or disproved, as to a material fact within the defendant's knowledge, it loses its weight as evidence.*—*Gunn v. Brantley*, 21 Ala. 633. In speaking of the difference between the respective allegations of the parties, as to the words "*understanding*" and "*agreement*," I do not mean to express an opinion as to whether there is, or is not, a difference as to the legal effect of these words, as used in the ordinance. The reference I make to these allegations is for the purpose of showing that the answer *is evasive*.

I now proceed to an examination of the material inquiry, whether, in the present case, the answer of Scheible is contradicted, or disproved, 'as to a material fact within his knowledge. It will not be denied, I presume, that the following allegations of the answer relate to a material fact in the cause: "Respondent being friendly to said Bacho, and being willing and desirous to assist him, told him he would lend him said sum of four thousand dollars, to enable him to purchase said house and lot, without charging any interest upon said sum, provided said Bacho would agree to pay to respondent said sum of money, in current funds, six months after the war was over, meaning the war between the United States and the Confederate States; that said Bacho distinctly agreed to this proposition, and thereupon respondent counted and delivered to him four thousand dollars in notes of the Confederate States." And further—"That respondent and said Bacho went to the office of George Conway, esq., who was told by said Bacho what was wanted, and respondent returned to his business; and in the evening of the same day, according to the best recollection of respondent, said Bacho handed said note to respondent; that respondent did not read said mortgage nor note, nor was either read to him; and *respondent supposed it was drawn according to said agreement.*"

It is true, parol evidence would not have been competent to vary the terms of the note and mortgage, as to the *time of payment* of the former; but it would have been competent to prove the allegations of the answer above copied, for the purpose of disproving the allegation of the bill that

the money loaned was to be returned *in like currency*; said respective allegations of the parties being wholly irreconcilable. Now, were any of the foregoing allegations of the answer, relating as they do to a material fact within the defendant's knowledge, contradicted or disproved? The allegation as to the time of payment of the money loaned, is flatly contradicted by the note and mortgage; and the allegation that the note and mortgage are variant from the contract as made, and that defendant did not know it when they were executed, is not only wholly unsustained by evidence on the part of the defendant, but is contradicted by the evidence of Conway, who was employed by the parties to draw up the papers, and who swears as follows: "Said Bacho and Scheible together told me how to draw the note and mortgage." And it is a most pregnant circumstance, in disproof of this portion of the answer, that Scheible should have received the note and mortgage, and had the latter recorded himself, and retained the possession of them both twelve months, before finding out that they were variant from his contract in the important respects before named. This he admits in his answer, and says that the tender to him of Confederate currency in payment of the note, at its maturity, was the occasion of his making the discovery. It is unreasonable to suppose that such carelessness and inattention should have been manifested in relation to a business transaction involving so large an amount.

In addition, the facts and circumstances connected with the transaction, disprove the allegation of the answer, that the contract as to time of payment, as shown by the note and mortgage, is untrue; and in disproving this allegation, they also establish the truth of the proposition contained in the bill, that it was, at the time of the loan, understood or agreed, that like currency to that loaned was to be received in payment of the loan; which proposition it is not necessary to establish by two witnesses, or one and strong corroborating circumstances, because the answer is conclusively shown to be untrue, as to a material fact within the defendant's knowledge, viz., as to the time when payment of the money loaned was to be made.

I now proceed to state some of these facts and circumstances. The note, it is true, was made payable in "*dollars* ; but what did the parties understand at the time, by the term "*dollars* ?" They could not have intended dollars in *gold* or *silver* ; for such, at the time, was not the circulating medium of the country ; and gold, according to the evidence, "was worth from two and a half to two and three quarters for one ; that is, one hundred dollars in gold were worth two hundred and fifty, or two hundred and seventy-five dollars, in Confederate States treasury-notes." Taking the lowest figures as to its value, if the parties intended that the note should be paid in gold, the complainant was giving the value of *ten thousand dollars* in Confederate currency, for the loan of *four thousand dollars* of the same currency, without interest, for about twelve months ! And this, too, when the value of gold, as compared with Confederate currency, was constantly on the increase. It would be unreasonable to hold such to have been the contract between the parties. For a promissory note of that date for four thousand dollars, *payable in gold*, twelve months after the date thereof, and reasonably well secured, a much larger sum could have been borrowed in *Confederate currency* than *four thousand dollars*.

The parties could not have understood that the note was to be paid in *greenbacks* ; for, if it was not against the law of the Confederacy to circulate, or deal in *greenbacks* at the time, none were in circulation ; they were, perhaps, a scarcer commodity in the Confederacy than gold itself, and, as compared with Confederate currency, were almost as valuable.

Again, Confederate currency was then the only circulating medium of the country, and all promises to pay *dollars*, based upon business transactions, were understood to mean dollars in Confederate currency ; and this was the case in Mobile, as the evidence shows, notwithstanding the note or paper was made payable at a bank. Such being the general rule, or understanding, in business transactions at the time, it is a legitimate presumption, that the parties did not intend the transaction in question to be an *exception* ;

or, if they did, that the exception would have been stated in the contract.

It would be a violent presumption, from all the facts and circumstances, to hold that the parties intended that the note in question should be paid in gold or its equivalent; while it is a natural and legitimate presumption, that they intended it should be paid in the only currency of the country then in use, and upon which business transactions were generally founded.

The fact that it turns out the complainant made a good investment of the currency borrowed, can have no controlling influence upon the question; nither would it have made any difference if he had invested it in "chips and whetstones."

I hold, therefore, that the answer is clearly disproved as to material facts, wholly irreconcilable with the truth of the denial therein that the note given for the money loaned was to be paid in Confederate currency; that being thus disproved, it is not entitled to the weight of evidence in its responsive allegations; and not giving the answer the weight of evidence, the proposition is satisfactorily established, that it was "undestood or agreed between the parties, that the note given for the money borrowed should be discharged by a payment in Confederate currency or treasury-notes."

It is with reluctance that I dissent from the opinion of my brothers on such a question; but the strength of my conviction as to the error of their conclusion, and the importance of the question to the complainant in the cause, constrain me to place this, my dissent, upon the record.

STEADMAN *vs.* STEADMAN.

[PETITION BY WIDOW FOR ALLOTMENT OF DOWER.]

1. *Right to dower of widow having separate estate; valuation of separate estate.*—In computing the value of a widow's statutory separate estate, on her application for dower in the lands of her deceased husband, (Code, § 1991; Revised Code, § 2380,) the value of her property at the time of the allotment of dower, and not at the death of her husband, must be taken; and consequently, where her separate estate consisted principally of slaves, which were emancipated, after the death of her husband, by the abolition of slavery in Alabama, their value is not to be estimated. (WALKER, C. J., *dissenting.*)

APPEAL from the Probate Court of Dallas.

IN the matter of the petition of Mrs. Mary B. Steadman, for an assignment of her dower in the lands of which her deceased husband, John Steadman, was seized and possessed at the time of his death. The petition was filed on the 2d April, 1866, and was finally heard, after several continuances, on the 11th March, 1867. The petitioner's right to dower was contested by the decedent's heirs-at-law, who filed an answer to the petition; in which they admitted the marriage of the petitioner with said John Steadman, his death, and his seizin during coverture of the lands described in the petition, as alleged; but denied that she was entitled to dower in the lands, "because, at the time of the death of the said John Steadman, she had a separate estate under the laws of Alabama, which, exclusive of the rents, income, and profits, and inclusive of the increase of slaves, was equal in value to her dower interest and distributive share in her husband's estate, estimating her dower interest in his lands at seven years' rent of said dower interest." The court sustained a demurrer to this answer, or plea, "because it does not show that said petitioner now has any separate estate, or that she had any

separate estate at the time of filing her said petition for dower;" to which ruling the defendants excepted.

"On the hearing of the petition," as the bill of exceptions states, "the plaintiff proved, that she married said John Steadman in the year 1859, and was his wife at the time of his death, which occurred in February, 1862; and that said John Steadman died seized and possessed of the lands described in the petition. The defendants then proved, that the said Mary B. Steadman, at the date of her said marriage with John Steadman, owned in her own right, and had in possession, a number of slaves, who, by virtue of her ownership and marriage, became her separate estate under the laws of Alabama; which estate she held, and had in possession as her separate estate, at the death of her said husband; and which was, at the death of her said husband, greater in value than her dower interest and distributive share in his estate at the date of his death, computing the value thereof under the rule prescribed by sections 1991 and 1992 of the Code of Alabama. The plaintiff then proved, that her separate estate consisted entirely in slaves; and that after the death of said John Steadman, but before the filing of her application for dower in this case, all of said slaves were emancipated by the State convention of Alabama, in September, 1865; and that she had no separate estate at the time of her said application, nor at the time of the trial. This being all the evidence, the court decreed, that the petitioner was entitled to dower in the lands described in her petition; to which ruling and decree the defendants excepted."

The sustaining of the demurrer to the answer or plea, and the final decree, are now assigned as error.

PETTUS & DAWSON, for the appellants.

J. R. JOHN, *contra*.

BYRD, J.—The appellee, at the death of her husband, had a separate estate, held under the Code, greater in value than her dower interest in, and distributive share of, the estate of her husband; computing the same by the rule prescribed in sections 1991 and 1992 of the Code, But the

only separate estate she owned at the death of her husband, or since, was entirely in slaves, who have since been emancipated, as held in the cases of *Smith (a freedman) v. The State*, decided at the January term, 1866, and of *Logan v. The State*, decided at the June term, 1867. The main question in this case is, whether the emancipation of the slaves of appellee, under the circumstances of this case disclosed by the record, exonerates her from accounting for their value, upon an application for dower. The Code does not fix the time at which the valuation of the wife's separate estate must be made, and has left that matter to be determined by judicial construction; and in doing so, it is our duty to follow the principles and analogies of the law. The question is one involving no inconsiderable interest and difficulty.

Where the husband sells and conveys lands, owned during coverture, and the alienee makes improvements upon the land, the widow is not entitled to dower in the improvements, but in the land according to its value at the time of alienation. Such we understand to be the law in this country, and in England.—*Barney v. Frowner*, 9 Ala. R. 901; *Beavers v. Smith*, 11 Ala. 200, and the authorities cited therein. If the heir makes improvements, after the death of the ancestor, and before the assignment of dower, the widow is dowable of the land and improvements; and if the value of the land is impaired after the death of the ancestor, and before the assignment of dower, she is dowable according to its value at the time of assignment, and not according to its value at his death, *at least* if such impairment is not caused by the negligent or willful conduct of the heir.—*Campbell v. Murphy*, 2 Jones' Eq. (N. C.) R. 357.

Under the statutes of distribution, the widow is entitled to a share of the personal estate of her husband; but the time at which the valuation is to be made, in order to ascertain the amount of her share, is not fixed by the statute; yet, it has been the uniform practice in this State, recognized by repeated decisions, to ascertain her distributive share according to the value of the personalty at the time of the distribution, and not according to its value at the death of the husband. It has been held by this court, that,

in ascertaining the distributive share of the widow, the court can not take into account the value of advancements made by the husband to any of his children.—*Logan v. Logan*, 13 Ala. 653. And so, too, upon the authority above cited, (2 Jones' Eq. R. 357,) dower should be assigned according to the value of the land at the time of assignment, where the husband dies in possession, and with the title vested in him, unaffected by any conveyance or incumbrance made by him.

If, then, the valuation of the land owned by the husband at his death, and of the personal estate, is to be estimated at the time of the assignment of dower and distribution of the personalty, for the ascertainment of her dower interest and distributive share; it would seem to be just and reasonable, that the same rule should be held applicable as to the valuation of the separate estate of the wife under sections 1991 and 1992 of the Code.

Equality is said to be equity; and in all cases of difficulty in the construction of statutes of this nature, this cardinal rule is of great service in the administration of justice. It may also be said, that there is equity in mutuality; and in adjusting the correlative rights and duties pertaining to the social relations, such a rule, when wisely applied, greatly promotes the ends of justice, and the interests of society.

No general rule on the subject can be adopted, and invariably applied, without causing some inequalities; and in particular cases, which are easily supposed, will work hardly. But this difficulty is inherent in the constitution of society and the transaction of human affairs; and we have not yet reached that degree of perfection in the progress of improvement and the administration of law, when such difficulties can be reconciled without occasional injustice, or solved without apparent inconsistency. Hence, it is thought, that fixed rules, wisely applied, operate more equitably than uncertain and changeable ones, or such as may be adopted to suit the peculiarities of each case.

If, then, a widow is only entitled to her distributive share of the personalty according to its value at the time of distribution, it would seem to follow, that she is not entitled to

a distributive share of property owned by the husband at his death, but which has been lost or destroyed during the administration, without any fault of the administrator; and if it has, she must look to the administrator, and not to the remaining property, for satisfaction of her claim. If the husband owned slaves at his death, and before distribution they are set free by a power over which the personal representative had no control, and which he could not resist, the widow would have no right to have them valued, and have her distributive share of such value satisfied out of the other personal assets of the estate, or to a decree against the personal representative for such share. And, by parity of reasoning, and the analogies of the law, we hold that the widow should not be held to account for the value of her separate estate, which she owned at the death of her husband, and which she has lost, *without any negligence or fault on her part*; and for such as she is accountable, she should account according to the value thereof at the time of distribution of her husband's estate, or of the assignment of dower.

This question has never been before this court for decision; but, in the case of *Dubose v. Dubose*, (38 Ala. 238,) it seems that the latter clause of the rule adopted by us, was acted on by the court below, and the commissioners who allotted the dower; and no question was raised in the court below, or in this court, on that point.

It may be said, with much force, that if the appellee in this case had applied for her dower before the emancipation of her slaves, she would not have been entitled to dower; and that, as she was not then entitled, the heir was not in default in not having dower assigned; and that, therefore, she should not, by her own delay, and the result of events which neither she nor the heir could control, obtain an advantage which the law did not give her at the death of her husband. This is the strongest argument of which we have conceived, against the rule we have adopted, as applicable to this case. But, under any other rule we might adopt, we can conceive of hardships equally great, and arguments as strong against such rule.

It is not shown by the record when administration upon

the estate of John Steadman was granted. If it had appeared that letters of administration had been granted more than eighteen months before the abolition of slavery, and that the estate was in a condition for distribution prior thereto; or that the estate had actually been distributed, without any application on the part of the appellee for a distributive share thereof, we will not decide whether such facts might not constitute an exception to the rule above laid down. We shall not attempt to define the exceptions that may exist to the rule. We think the rule a sound one, and that this case is not an exception thereto, and is within the scope of its operation.

To adopt the rule, that the separate estate of the widow must be valued at the death of the husband, or that such estate, whether in existence or not, must be valued at the date of the distribution of the personalty or the assignment of dower, would be inconsistent with the principles applicable to the interest which a widow has in the personalty and realty of the husband. And the rule we have indicated as the correct one, as applicable in cases like this, is the one which seems to be in accordance with the legislative intention, apparent from the use of the phrase contained in section 1991, "exclusive of rents, income, and profits, and inclusive of the increase of slaves." Why did the legislature use this expression? A previous section of the statute gave the rents, income, and profits of the statutory separate estate, to the husband; or, rather, it declares, that he shall not be accountable for them, "to the wife, her heirs, and legal representatives." Hence, that clause must refer to such rents, income, and profits, as accrued between the death of the husband and the distribution of his estate. And as to the clause, "inclusive of the increase of slaves," it certainly did not refer to such increase prior to the death of the husband; for it would constitute a part of the *corpus* of her estate before and at his death. *Partus sequitur ventrem*. But it evidently refers to such increase subsequent to the death of the husband, and prior to the distribution of his estate. And this was required for a very good reason; which was, that she would be entitled at the distribution of his estate to her distributive share of the

increase of the slaves of his estate ; and so she would be to the income and profits arising from the estate of the husband. And we presume the legislature intended, if they did not see, that, by the provisions of the law, her right to dower would be in abeyance until the distribution of the husband's estate ; and therefore that it could not be ascertained, until that time, whether she would be entitled to dower or not. If, at that time, she had no statutory separate estate, although she had one when her husband died, which she had lost without any fault on her part, or by events over which she had no control, then her right to dower would cease to be in abeyance, and she would be entitled to all the rights of a widow who had no statutory separate estate. But if, at the time of distribution, she possessed any separate estate, then the rule laid down in *Glenn v. Glenn's Adm'r*, decided at the present term of the court, would be applicable. So, if the estate of the husband is destroyed by natural causes, or such as the personal representative could not control nor resist, she would have no right to a distributive share of, or dower in, such property, out of such personalty or realty belonging to the estate, as was still in existence.

In the construction of statutes, every word and part of a sentence must be given some influence and office, in order to arrive at the intention of the legislature and the meaning of the statute ; and no word should be rejected as superfluous, where it can be assigned an office, consistently with the evident intention of the legislature, or where it can aid in arriving at that intention.—*Spivey v. The State*, 26 Ala. Rep. ; Dwarris on Statutes, 702-07 ; Sedgwick on Stat. & Con. Law, 245-6, 260.

Quere—Would the rule laid down apply to the right of the widow to dower in land aliened by the husband during the marriage ? and do the words "dower interest," in section 1991 of the Code, include her right of dower to such land ? These questions are not answered, because they have not been presented in a form for adjudication, nor been argued.

The ruling of the court upon the demurrer, if erroneous, was without injury to appellant.—*Lawson v. Hicks*, 38 Ala,

279; *Kennedy v. Lambert*, 37 Ala. 57; *Goggins v. Smith*, adm'r, 35 Ala. 683.

The decree is affirmed.

A. J. WALKER, C. J.—Section 2380 (1991) of the Revised Code is in the following words: "If any woman, having a separate estate, survive her husband, and such separate estate, exclusive of the rents, income, and profits, and inclusive of the increase of slaves, is equal to, or greater in value than, her dower interest and distributive share of her husband's estate, (estimating her dower interest in his lands at seven years rent of the dower interest,) she shall not be entitled to dower in, or distribution of, her husband's estate." This law establishes a bar of the widow's dower and distributive share, predicated upon a comparison of their value with the value of her separate estate. The bar is effective, when the value of the separate estate is equal to, or greater than, the value of the dower and distributive share. The comparison of values must, in my judgment, relate to the time of the husband's death. The valuation of the separate estate, and of the dower and distributive share, is to be taken at that time, and in the condition in which they respectively existed at that time. The converse of this proposition is, that the comparison of value is to be made in reference to the time of distribution, and of the assignment of dower. The proposition is maintained, and its converse refuted, by the same argument.

If my proposition is not correct, and if the converse of it is, the right of dower does not exist at the husband's death, but springs up at the time of distribution; and although the state of facts may exist at the husband's death, under which the widow is entitled to dower, a change may be effected by a subsequent change in the condition of the property. Her separate estate may be less in value at the husband's death, than the dower and distributive share, and it may be greater when the estate is ready for distribution; and *e converso*, her separate estate may be as valuable as dower and a distributive share at the husband's death, and at the time of distribution it may be less valuable. It is obvious, therefore, that if the comparison of

value is not made until the time of distribution, the right of dower does not attach at the husband's death, but is contingent, and is dependent upon subsequent circumstances, and is not a right at all until the time of distribution. This can not, in my judgment, be the law.

Such a construction of the statute changes the nature of the dower right entirely. The right of dower is inchoate until the husband's death, and then it is consummated. Marriage, seizin, and death are the essential, and only essential, requisites of dower. It vests at the husband's death. Park on Dower, 7, 247; Lambert on Dower, 26; 1 Scribner on Dower, 618; 2 *ib.* 26; Co. Litt. book 1, ch. 5, § 36, p. 31; *Boyd v. Harrison*, 36 Ala. 533; *Polier v. Barclay*, 15 Ala. 451; *Beavers v. Smith*, 11 Ala. 321.

It is settled in this State, that the widow's quarantine commences at the husband's death, and that she is entitled to the rents of the dwelling-house and the plantation connected therewith from the death of the husband until dower is assigned.—Revised Code, § 1630 (1359;) *Waters v. Williams*, 38 Ala. 680; *McAllister v. McAllister*, 37 Ala. 484; *Oakley v. Oakley*, 30 Ala. 131; *McLaughlin v. Goodwin*, 23 Ala. 846; *Pharis v. Leachman*, 20 Ala. 662–686; *Wallace v. Hall*, 19 Ala. 367; *Cook v. Webb*, 18 Ala. 810; *Inge v. Murphy*, 14 Ala. 289. This widow's quarantine, it is also settled, is a statutory substitute for dower until it is assigned, and can only exist when there is a right of dower. *Shelton v. Carrol*, 16 Ala. 153; *Boynton v. Sawyer*, 35 Ala. 497; *Vaughn v. Vaughn*, 30 Ala. 329; *Weaver v. Crenshaw*, 6 Ala. 873. Therefore, the proposition, that the dower does not attach until the distribution of the estate, deprives the widow of her quarantine, and, when she has a separate estate, practically abrogates the humane provision of the law for her maintenance until her dower is assigned.

Where any provision is made for the widow by her husband's will, she forfeits her dower by a failure to dissent within twelve months.—*Adams v. Adams*, 39 Ala. 274. Now, if the right of dower can be controlled by events occurring subsequent to the husband's death, the existence of a right of dower may be affected by circumstances occurring after the expiration of the period allowed for an election between

the provision made by the will and dower, to be signified by a dissent from the will. It would, therefore, happen that, where the widow has a separate estate, she would be deprived of the right of dissent, unless the distribution of the estate could be made in twelve months ; which certainly cannot be accomplished, in most cases, in less than eighteen months. When there is a will making any provision for a widow, who has any separate estate, it must happen in most, if not all cases, (under the ruling of my brethren,) that she will be deprived of her dower, for the ascertainment of the right of dower will be postponed beyond the period allowed for electing to take it.

The statute bestowing the widow's quarantine, existed before the adoption of the Code of 1852, and was construed, in repeated decisions, to vest in the widow a right to the possession of the dwelling-house, and the plantation connected therewith, for an indefinite period, commencing at the husband's death, and terminating only with the assignment of dower. This law must be deemed to have been incorporated into the Code, with its established construction. Indeed, decisions made since the Code became the law of the State, re-assert the construction of the law. The decision of the majority of the court effects, in my judgment, an entire change in the law as thus construed, and makes the quarantine, if the widow have any separate estate, an interest commencing at some undefined and undefinable time in the future, when the estate may be ready for distribution. The provision of a home and support for the widow, pending her doleful and helpless condition between the death of her husband and the assignment of her dower, which is the beneficent object of the law, is defeated, and the very purpose of the law-maker is thwarted, by the ruling of my brethren.

Section 1630 (1359) of the Revised Code in its language means, and, I think, has always been understood to mean, that the widow's quarantine commences at the husband's death. The opinion of my brethren has the effect, in my judgment, to change that section, so as to make it read as follows : "The widow may *retain* possession of the dwelling-house where her husband most usually resided next

before his death," &c., "until her dower is assigned her, free from the payment of rent, *unless she has a separate estate; and then she shall be entitled to such possession, only when the estate shall be ready for distribution.*" The decision of the court seems to me more difficult of reconciliation with justice, in view of the fact that the acceleration or delay of distribution is not under the widow's control. The statute contemplates, that the widow is to *retain* possession. The decision in this case authorizes her ejection from the possession, until at some future time certain valuations can be made.

The Code of 1852, which contains section 1991, (the law under construction,) was a system the different parts of which are framed in reference to each other; and each part is, therefore, to be construed in reference to others upon the same subject. Now, section 1372 of the Code of 1852 was in the following words: "All suits or proceedings for dower must be commenced within three years *after the death of the husband*, and not after." Here, then, a comprehensive and inflexible rule was established, which initiated the operation of the statute of limitations against the right of dower, *in all cases*, from the husband's death. The construction of section 1991, which makes the dower under it originate at a day subsequent to the husband's death, postpones the commencement of a right to a time subsequent to that at which the statute of limitations has begun to operate against it.

Section 2380 (1991) of the Revised Code places a widow's distributive share in her husband's estate in the same category with dower; and if she has no property in dower, until the period of distribution arrives, neither can she have any property in the distributive share before the arrival of the same period. It is settled, however, that the right of a distributee vests at the husband's death.—*Hardy v. Boaz*, 29 Ala. 168; *Sterns v. Weathers*, 30 Ala. 712; *Sharp v. Burns*, 35 Ala. 653; *Anderson v. Anderson*, 30 Ala. 683. If, therefore, the section under consideration postpones the commencement of property in dower, it delays to the same extent the property in a distributive share, and creates a new character of distributive share—one that commences,

not at the husband's death, but at some later day. I can not conceive how it is that a wife's right as distributee can be the result of such unfavorable discrimination, when her right to a distributive share is given in the same section and by the same words with the distributive shares of other distributees.—Revised Code, § 1897 (1581).

The decision of the court involves a postponement of the dower right to *final* distribution. It therefore deprives her, if she has any separate estate, of the benefit of the statutes providing for partial distribution, under specified restrictions and regulations, after the expiration of eighteen months.—Revised Code, § § 2105 (1778), *et seq.*

A further objection to the opinion of the court, drawn from our own statutes, is, that it must result in a destruction of analogy between the relation of the wife to the husband's estate, and that of the husband to the wife's estate, and in an unreasonable discrimination against the wife. It leaves the husband to enter upon the enjoyment of one half the personalty, and all the realty, of the wife's separate estate, at her death; but, if she has a separate estate, no matter how small, delays every interest of the wife in the husband's estate, to an undefined day in the future.

It is a wise and prudent, as well as an established principle, that statutes in derogation of the common law are to be strictly construed.—Sedgwick on Statutory & Con. Law, 313. It is also a settled principle, that dower is a right highly favored in the law; and courts do not incline to constructions which trench upon it.—*Ridgway v. McAlpine*, 31 Ala. 458. The statute in hand is an infringement upon the common law in this, that it takes away the right of dower in a class of cases, in which the common law would have given it. It should, upon the principles above stated, be strictly construed, and construed favorably to the right of dower. In my judgment, the decision of the majority of the court, construing this statute to prevent the consummation of dower at the husband's death, is at variance with both those principles.

From the inclusion of the increase of slaves, and the exclusion of rents and profits, in the estimate of the value of the wife's separate estate, an argument is drawn by my

brethren in support of the postponement of the dower. This argument is predicated upon the idea, that the statute means such increase of slaves, and such rents and profits, as may accrue after the husband's death. This idea is, in my judgment, erroneous. It seems to me that the reference is to the increase of slaves, and the rents and profits, which accrued during the coverture; and that the increase of slaves is included in the estimate, because it belonged to the *corpus* of the wife's separate estate; and the rents and profits were excluded, because they belonged to the husband.

I agree that there are difficulties in carrying my construction of the law into operation. It may be impossible to ascertain at the husband's death what is the value of the distributive share. It is believed, however, that in many, if not most cases, it can be approximated sufficiently to enable the court to determine the question of the right of dower. If a case arises where it could not be ascertained, the proper course would probably be to postpone the assignment until the requisite information could be obtained. Be this, however, as it may, I think the carrying into operation of the opposite doctrine will be met with still greater difficulties. I do not think it possible now to anticipate the magnitude of the difficulties and confusion, which will attend the practical operation of the rule adopted by the majority of the court.

The difficulty of the practical operation of the decision of the court will be seen, if the mind reverts to the inquiry, what rule is to govern, when the separate estate of the widow, being personalty, is disposed of and carried away, so that its value can not be ascertained at the time of distribution; when the separate estate is increased in value by the operation of natural causes, or by the skill, industry, or expenditure of the widow, or is lessened by her negligence; or when the estate of the deceased husband is reduced in value by the misconduct of the administrator. These inquiries might be extended, but enough has been said to invite scrutiny and direct investigation.

This dissenting opinion is prepared in reference to, and with a view to support, my dissent in the case of *Glenn v. Glenn's Adm'r*, at the present term.

MOBILE & OHIO RAILROAD CO. *vs.* HOPKINS.

[ACTION AGAINST RAILROAD COMPANY, AS COMMON CARRIER, FOR LOSS OF PASSENGER'S BAGGAGE.]

1. *Common carrier; liability for loss of passenger's baggage; stipulation for exemption in free ticket.*—Although a common carrier may specially contract for exemption from the extraordinary responsibility imposed on him by the common law, public policy forbids that he should be allowed to contract for exemption from liability for damages caused by the negligence, willful default, or tort, of himself or his servants; and this rule applies also where he undertakes to transport passengers gratuitously, or under “free tickets,” containing an express stipulation on the part of the passenger, that, “in consideration thereof, he assumes all risk of accidents, and expressly agrees that the carrier shall not be liable under any circumstances, whether of the negligence of his agents or otherwise, for any injury to the person or property.”
2. *Same; stipulation limiting value of baggage.*—The same rule applies to an express stipulation in tickets, or checks for baggage, limiting the responsibility of the carrier to a specified sum as the value of a passenger's baggage: such stipulation, though made by special contract, can not exempt the carrier from liability for the negligence, willful default, or tort, of himself or his servants.
3. *Same; termination of liability by delivery; agency question of fact.*—A delivery of baggage by a railroad company, at the end of the passenger's journey, either to him or to his authorized agent, terminates the liability of the company as a common carrier; but a delivery at the terminus of the defendant's road, to the baggage-master of an independent steamboat company, who, by agreement between the railroad and steamboat companies, always entered the defendant's cars before their arrival at the depot, and took the baggage-checks of through passengers, giving in exchange for them the checks of the steamboat company, would not discharge the defendant from liability for a loss caused by the larceny of its servants after the delivery of the baggage to the baggage-master of the boat, unless the baggage-master was the plaintiff's authorized agent to receive the baggage; and it being a controverted question of fact in the case, whether he was the plaintiff's agent to receive his baggage, or the defendant's agent, by agreement with the steamboat company, to take charge of the baggage and deliver it at the boat, a charge which, in effect, assumes that he was the plaintiff's agent, is an invasion of the province of the jury.

APPEAL from the City Court of Mobile.
Tried before the Hon. H. CHAMBERLAIN.

THIS action was brought by Mrs. Julia A. Hopkins, against the appellant, and was commenced on the 30th October, 1866. The complaint contained two counts, which were in the following words: (1.) "The plaintiff claims of the defendant fifteen hundred dollars, as damages, for the failure to deliver certain goods, viz., (specifying them,) "all the property of the plaintiff, of great value, to-wit, of the value of fifteen hundred dollars, received by the defendant, as a common carrier, to be delivered to the plaintiff at Columbus, Kentucky, for a reward; which the defendant failed to do." (2.) "The plaintiff claims of the defendant, also, the further sum of fifteen hundred dollars, as damages, for this: that heretofore, to-wit, on the 13th day of March, 1866, at the city of Mobile in the county aforesaid, the said defendant, being then and there a common carrier of passengers, baggage, and goods, on a certain railroad of the defendant, between the said city of Mobile and Columbus, in the State of Kentucky; and the plaintiff being then and there a passenger of the defendant's on said railroad, and intending to travel on said railroad, from Mobile to Columbus, of all which the defendant then and there had notice; the defendant, in consideration that the plaintiff would then and there deliver to the defendant a certain trunk of the plaintiff, then and there containing wearing apparel, and other goods and chattels of the plaintiff, of great value, to-wit, of the value of fifteen hundred dollars, in good order and condition, to be carried by the defendant for the plaintiff, as baggage, from Mobile to Columbus aforesaid, then and there undertook and promised the plaintiff to carry the said trunk, and the wearing apparel and other goods therein contained, safely, from Mobile to Columbus aforesaid, and to deliver the same to the plaintiff, in like good order and condition, at Columbus aforesaid. And the plaintiff avers, that, confiding in the said promise and undertaking of the defendant, she did then and there deliver to the defendant, and the defendant did then and there receive from the plaintiff, the said trunk, with the said wearing apparel and other goods and chattels therein contained, in good order and condition, to be safely carried by the defendant, for the plaintiff, from Mobile to Colum-

bus aforesaid, as baggage, and to be delivered to the plaintiff, in like good order and condition, at Columbus aforesaid. Yet the said defendant, not regarding its said promise and undertaking, did not, nor would, safely carry the said trunk, with the said wearing apparel and other goods and chattels therein contained, from Mobile to Columbus, for the plaintiff, and did not, nor would, deliver the same to the plaintiff, in like good order and condition, at Columbus or elsewhere, though often requested so to do; but, on the contrary thereof, the said defendant so carelessly, negligently, and improperly behaved and conducted itself, in respect to the said trunk, and the said wearing apparel, goods, and chattels therein contained, that by and through the mere and gross carelessness, negligence, and misconduct of said defendant and its servants, in that behalf, the said trunk was broken open by a servant or employee of said defendant, whilst in the possession of said defendant as aforesaid, and the said wearing apparel, goods, and chattels taken therefrom, and greatly damaged, and wholly lost to the plaintiff; to her damage," &c.

The defendant filed three pleas; the first of which was a general denial of "each and every allegation of said plaintiff's complaint," and the others were in the following words: (2.) "And for further plea in this behalf, defendant saith, that said plaintiff ought not to recover, because he saith that, on said 13th March, 1866, plaintiff was received by defendant as a passenger on its said train, not as a passenger to be carried for hire or reward, but as a complement to said plaintiff, because she was the widow of a former president of said defendant company; and no hire or reward was paid by her, or received by the defendant, for the carriage of herself or baggage upon said defendant's road, at the time, and in the manner complained of; and said plaintiff received and accepted from defendant a ticket, in words and figures following," &c., (setting it out,) "and came into defendant's cars, and she and her baggage were transported on and over defendant's road, upon the undertaking and agreement, and upon the terms stated in said ticket, and upon no other. And the defendant avers, that the loss of baggage complained of by the plaintiff oc-

curred at the time of the transportation and carriage aforesaid, and at no other time." (3.) "And for further plea in this behalf, the defendant saith, that the plaintiff ought not to recover, because it saith, that true it is that said plaintiff was, on said 13th March, 1866, a passenger on defendant's railroad, from Mobile to Columbus, and did then and there deliver to defendant a certain trunk, containing sundry goods, as baggage of said plaintiff; and the defendant avers, that the plaintiff and her said baggage were received on said defendant's cars, to be carried from Mobile to Columbus, without fee or reward, and upon the express understanding and agreement, that said plaintiff assumed to herself all risk of accident, and that the defendant should not be liable under any circumstances, whether of the negligence of their agents or otherwise, for loss or injury to her person or property; and that the loss and injury complained of happened to plaintiff's property while she was so travelling upon defendant's line of road, and upon the understanding and agreement aforesaid."

The ticket set out in the second plea, which was signed by the president of said railroad company, was in the following words :

MOBILE AND OHIO RAILROAD.

NOT TRANSFERRABLE.

PASS MRS. A. F. HOPKINS,

To Columbus, Kentucky.

70 The person accepting this free ticket, in consideration thereof, assumes all risk of accident, and expressly agrees that the company shall not be liable, under any circumstances, whether of the negligence of their agents or otherwise, for any injury to the person or property.

71 If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare.

The plaintiff took issue on the first plea, and demurred to the second and third, assigning the following causes of demurrer to each : " 1st, that said plea does not deny that the injury complained of was occasioned by the gross neg-

ligence of the defendant or its servants ; 2d, that said plea does not deny that the injury complained of was occasioned by the misconduct of the defendant or its servants ; and; 3d, that said plea is, in law, an admission that the injury complained of was occasioned by the gross negligence or misconduct of the defendant or its servants, and the facts stated in the plea are not such as to relieve the defendant from liability for such injury." The court sustained the demurrer, and the trial was had on issue joined on the first plea.

"On the trial of the cause," as the bill of exceptions states, "the following facts were proved : That the defendant is a corporation, operating a line of railway for the transportation of passengers and freight, from its depot at Mobile, Alabama, to its depot at Columbus, Kentucky; and that there is a steamboat running regularly on the river, from Columbus, Kentucky, to Cairo, Illinois; which said steamboat does not belong to said defendant, and is not managed or directed by said defendant, but by independent parties, and is run by them in concert with said defendant's trains, so as to transport passengers from Columbus to Cairo. Prior to the 13th March, 1866, plaintiff applied to defendant for, and received from it, to travel on its road, without compensation for carriage of herself or baggage, the ticket which is set out in defendant's second plea ; and on said 13th March, 1866, intending to go to Virginia, she became a passenger on defendant's cars, from Mobile to Columbus, and accepted and used said ticket, and travelled by virtue of said ticket. Plaintiff and her baggage were safely landed from defendant's cars, at Jackson, Tennessee, and remained there until the 21st March, 1866 ; on which day, by virtue of said ticket, plaintiff again became a passenger on defendant's cars, and used said ticket for that purpose, from Jackson, Tennessee, to Columbus, Kentucky. At Jackson, Tennessee, plaintiff delivered her baggage, consisting of four or five trunks, to the defendant's proper servant, the baggage-master, and received from him, as a token of said deposit, a slip of brass, commonly known as a baggage-check, on which were impressed the following marks and numbers : ' No. —. In consideration of free

carriage, its value is agreed to be limited to \$100.' The rule of the defendant, which is also printed on the face of all passenger-tickets issued by it, is, 'Baggage to consist of ordinary wearing apparel, and no responsibility for it over \$100 in value. Company not responsible for unchecked baggage.' No separate charge is ever demanded of a passenger for the carriage of his baggage: it is carried by the defendant, as above stated, upon payment of the regular passenger fare, of so much per mile. By agreement between the defendant and said steamboat company, the baggage of passengers by the cars is transferred by the servants of the latter, from the platform at Columbus, where the cars stop, to the boat. The defendant's servants place the baggage, from its cars, on the platform at the depot, whence it is carried to the boat by the servants of the steamboat company; and this was the usual and customary mode of doing business, on said 21st March, 1866, and before and since that time. To facilitate the transfer of baggage, and expedite the traveller on his journey, it was and is usual for the baggage-master of the boat to enter the defendant's cars, at the first station south of Columbus, go through the cars, collect the baggage-checks of those passengers who were going beyond Columbus, and who chose so to surrender them, and, before the cars reached Columbus, deliver the checks thus received to the defendant's baggage-master, and place on the baggage the checks of the steamboat company. The baggage, thus re-checked, was separated from the other baggage, which remained in the cars until delivered by the defendant's baggage-master to the person presenting the company's checks. Baggage is always delivered to the person who presents the check received by the passenger, which is the counterpart of that attached to the baggage. Before reaching Columbus, the plaintiff delivered to the baggage-master of the boat, as was usual, the checks which she had received from the defendant, and received from him, in lieu thereof, a card with the number of her check, and did not herself demand her baggage from the baggage-master, but passed directly on to the boat, which lay in the river, at the distance of one or two hundred yards from the platform where the cars stopped at

Columbus. As was usual, before the train stopped at Columbus, the defendant's baggage-master received the checks for the plaintiff's baggage, from the baggage-master of the boat, and her baggage was separated from that for which the checks had not been surrendered; and the defendant's baggage-master thereafter considered it in charge of the boat's baggage-master, though it still remained in the defendant's baggage-car. On the arrival of the cars at Columbus, the defendant's baggage-master, in the manner usual and customary in the defendant's business, caused the plaintiff's baggage to be delivered from the baggage-car, and placed on the platform of the depot at Columbus. The baggage-master of the boat was then and there superintending the removal of the passengers' baggage in the manner usual and customary. At the time of its removal from said baggage-car, the plaintiff's said trunk was whole and sound, as when received from her by the defendant. The plaintiff first learned of the loss of her trunk, which was one of her trunks carried as baggage aforesaid, after she had gone on board of the boat at Columbus, on her way to Cairo, Illinois, when the baggage-master of the boat informed her that one of her trunks had been left behind; but he promised, that it should be sent by the next trip of the boat, and would reach her at Cincinnati. The plaintiff has never received her trunk, but only a small part of the contents thereof. The articles so received by her were found, with other stolen articles, in a room of defendant's freight-house at Columbus, which was occupied by a watchman and switchman in the defendant's employment, one of whom was afterwards tried and convicted of the felony, while the other escaped. These men were employed by the defendant in its local service at Columbus, and were not in any way connected with the defendant's trains.

"The court charged the jury, that the defendant was a common carrier, and was liable for all losses, not caused by the act of God, or the public enemy; that though it might, by special contract, limit its liability to some extent, it could not, by any contract, exempt itself from liability for loss arising from the gross negligence or misconduct of itself or its employees; that the restriction expressed in

the ticket accepted and used by the plaintiff, furnished no defense to the defendant, against the plaintiff's demand for loss by the larceny of the defendant's servants, while acting as such; and that in like manner, though the defendant might make reasonable by-laws, and limit the amount of its liability in certain cases, the limitation of one hundred dollars to the value of passengers' baggage would be unreasonable, and could not apply, if the loss arose from gross negligence, or misconduct, of the defendant's servants.

"The court charged the jury, also, as to the termination of the risk, that if they believed the plaintiff's trunk was delivered at Columbus, to a person whom the plaintiff knowingly appointed her agent, and authorized to receive it, then the defendant would not be liable; but, if she delivered her check to a person who passed through the cars, and who was receiving checks from passengers by permission of the defendant, she not knowing for whom such person was acting, that would not so constitute him her agent, that a delivery of plaintiff's trunk to him by the defendant would discharge the defendant from liability; that the delivery of plaintiff's trunk, by the defendant's baggage-master, to the baggage-master of the boat, on the presentation by him of the check which the plaintiff had received from the defendant, and a taking charge thereof by him, before the cars reached Columbus, would not be a delivery, to relieve the defendant from its liability; that the defendant's liability ceased, only when it delivered the baggage, at Columbus, to the plaintiff, or to some one whom she had authorized to receive it for her; and the court referred to the jury the question, whether the trunk had been delivered by the defendant to any one at Columbus, and, if so, to whom, and whose agent was the person to whom such delivery was made.

"The defendant excepted to each of these charges, and requested the court to instruct the jury, that if the plaintiff made no application herself for her baggage, and it was applied for by the party to whom she delivered her check, and delivered to him, the fact that no application was made by her might be considered by them, in determining the question as to his authority to receive it, as well as any ac-

quiescence in his having received her baggage ; also, that the delivery of freight or baggage on the platform of the company, at the end of the journey, to one charged to receive it by the plaintiff, (the plaintiff being present,) and who receives it, and surrenders to the company the check given for it, puts an end to the liability of the carrier ; also, that if the jury believed, from the evidence, that the plaintiff received from the railroad baggage-master a check for the trunk sued for, and, when near the place of destination, delivered the check to the baggage-master of the steamboat company, so as to authorize him to receive the trunk on arrival, and that it was safely landed from the baggage-car on the platform of the company, at Columbus, and was there received by the baggage-master of the steamboat company, and the check surrendered by him to the baggage-master of the railroad, (the steamboat line being disconnected from the railroad company,) then the duty of the defendant was at an end. The court gave each of these charges as requested.

“The defendant also requested the court to charge the jury—1st, ‘that if the plaintiff’s baggage was safely carried, and delivered from defendant’s car, on the platform at the terminus of the defendant’s line, in the manner usual in the defendant’s business, the plaintiff can not recover ;’ 2d, ‘that if the plaintiff received from the defendant a check for her baggage, and delivered said check to the baggage-master of the steamboat, and he delivered it to the baggage-master of the defendant, and took charge of the baggage, in the manner usual and customary in the defendant’s business, at the terminus of the defendant’s road, the plaintiff can not recover ;’ 3d, ‘that if the defendant delivered plaintiff’s baggage, at the terminus of its road, according to its customary mode of business, to a person who presented the check which the plaintiff had received from the defendant for her baggage, and which such person had received from plaintiff, plaintiff can not recover.’ The court refused to give each of these charges, and the defendant excepted to their refusal.

“The defendant also asked the court to charge the jury, that if they believed, from the evidence, that the plaintiff

received a check for the carriage of her trunk, under which it was carried, and which limited the liability of the company for baggage to one hundred dollars, and that this trunk was one of several carried as baggage with the plaintiff as a passenger, and that the carriage of the company was without any payment of freight or passage, paid or to be paid to the company, but under the agreement of the company with the plaintiff set forth in the complimentary ticket which she received, (the defendant having no notice of the value of the articles in the trunk, nor of what such articles consisted,) the defendant could not, if liable, be charged for a greater amount than one hundred dollars. The court refused to give this charge, and the defendant excepted to its refusal."

The sustaining of the demurrer to the second and third pleas, and the several rulings of the court in the charges given and refused, to which exceptions were reserved, are now assigned as error.

P. HAMILTON, and GEO. N. STEWART, for appellant.—There was no conflict whatever in the evidence. The facts of the case were undisputed, and they present for decision three important questions. 1. Was the defendant liable at all, under the ticket which the plaintiff received and used, for the loss of her baggage, or any other injury which she might have received? 2. If liable at all, was not that liability restricted to the amount expressly stipulated as the value of a passenger's baggage? 3. Was not the defendant's liability, whatever it was, terminated by a proper delivery of the baggage at the end of the plaintiff's journey?

1. A common carrier may, by special contract, limit and restrict the extraordinary liability which the common law cast on him.—*Steele & Burgess v. Townsend*, 37 Ala. 247; *Dorr v. N. J. Steam Nav. Co.*, 1 Kernan, 485; 3 Wallace, (U. S.) 107; *Wells v. Central Railroad Company*, 24 N. Y. 181; *Perkins v. Same*, 24 N. Y. 196; *Bissell v. Same*, 25 N. Y. 442. The defendant here did specially contract for exemption from liability, "under any circumstances, whether of negligence of their agents or otherwise, for any injury to person or property;" and the plaintiff expressly assumed

"all risk of accidents." Under the contract evidenced by this ticket, the defendant did not occupy to the plaintiff the relation of a common carrier: one important element of that relation is wanting—no reward was paid or received for the service to be performed.—1 Pick. 50; 2 Dana, 430; 1 Salk. 249. The case presents no question of antecedent public duty on the part of the defendant, and excludes the idea of any implied contract: it stands entirely on a consideration of the liability actually assumed. The defendant is a corporation, and can only act through its agents or servants; and it was a fair matter of agreement between it and the plaintiff, which should assume the risk of these careless or dishonest agents. The agents themselves remain responsible, civilly and criminally, for their acts; and the contract does not in any manner enure to their benefit, or shield them from the consequences of their acts. The defendant was under no obligation to carry the plaintiff gratuitously, and the plaintiff was not compelled to accept the proffered compliment. She might have refused the free ticket, and compelled the defendant to carry her under its ordinary rules of responsibility; but, having accepted it, and received the benefits of it, she can not now repudiate the risk which she thus voluntarily assumed. The contract was valid, and the loss fell within its terms.—See New York cases above cited; also, 4 Selden, 381; *Kimball v. R. & B. Railroad Company*, 26 Vermont, 247; 7 English L. & Eq. 395; 14 *ib.* 340; 5 *ib.* 329; 11 *ib.* 506; 36 *ib.* 574; 25 *ib.* 396; 10 *ib.* 366.

2. If the defendant could protect itself, by contract, against loss by reason of the negligence of its servants, as the authorities above cited hold, it could certainly limit the amount of liability to be incurred from the same cause. Besides, the baggage was carried without charge; and in consideration of its free carriage, it was expressly agreed, that its value should, without further inquiry, be limited to one hundred dollars. In the carriage of passengers' baggage, a railroad company is a common carrier, and may by contract limit its liability. It receives no compensation for such service, and does not know the nature or value of the articles contained in the trunk. It is but reasonable that

it should limit the amount of its risk ; and it would be a fraud on the carrier, to allow the passenger, after having been notified of the limitation, to reject it after a loss has occurred.—Redfield on Railways, § 134, 1 Parsons on Contracts, § 711, and note ; Angell on Carriers, § 245 ; 2 Greenl. Ev. § 215.

3. As to the termination of the defendant's liability: Without regard to the construction of the contract on the points above stated, it is insisted that the facts clearly showed a termination of the defendant's liability ; that it had performed all that it had undertaken to do ; and that the court might properly have charged the jury, if they believed the evidence, they must find for the defendant. It was the defendant's duty to carry the trunk to the end of its road at Columbus, and there deliver it, in the manner usual and customary, either to the plaintiff, or to any other person whom she might authorize to take charge of it ; and it was the duty of the plaintiff, on the other hand, to be present in person, or through her agent, to demand and receive it. The trunk was safely delivered on the platform at the depot, according to the defendant's usual mode of doing business, and was there received by the person to whom the plaintiff had surrendered her check, and who was the only person that could demand it. The baggage-check was the evidence of the contract between the parties : it stands in the place of a bill of lading.—2 Redfield on Railways, 38-9 ; 7 Rich. (S. C.) 158. The possession of this check is proof of the holder's authority to receive the baggage. The defendant was bound to deliver, and did deliver the trunk, "in the usual manner it delivers baggage."—29 Eng. Law & Eq. 347 ; 7 Common Bench, 839 ; 15 La. Ann. 14 ; 23 Howard, 38 ; 5 Dutcher, 392 ; 1 Gray, (Mass.) 263 ; 12 Indiana, 55 ; 23 Vermont, 186 ; 34 N. Y. 551 ; *Richards v. Railway Company*, 7 M., G. & S. 839 ; 33 Law & Eq. 235. That the plaintiff was chargeable with notice of the defendant's rules, and customary mode of doing business, see 11 Wheaton, 438 ; 9 Wheaton, 582 ; 2 Sm. & Mar. 227 ; 26 Law & Eq. 297. There was no controverted question of fact in the case ; no uncertainty as to the character in which the baggage-master of the boat

was acting; no pretense that his acts were not authorized by his employers, or that the plaintiff was in any manner deceived or misinformed as to his character and authority. The plaintiff was under no obligation to entrust her checks or baggage to his care, and consulted her own convenience only in doing so, relying on the responsibility of his principal, the steamboat company, for his acts. It is submitted that the court erred in its rulings on this point, and particularly in the refusal of the second charge asked by the defendant. That charge was justified by the evidence, and asserted a correct legal proposition; and it ought to have been given as asked.

WM. G. JONES, *contra*.—1. The law is settled in this country, that a person travelling gratuitously, or under a free ticket, may recover damages of the carrier, for injuries resulting from gross negligence, or malfeasance.—*Phil. & Reading Railroad Company v. Derby*, 14 Howard, 468; *Steamboat New World v. King*, 16 Howard, 469; *Redfield on Railways*, 328.

2. It may be conceded to be now settled, after much doubt and conflict of decision, that a common carrier may, by special contract, to some reasonable extent limit his common-law liability; but it is equally well settled, that he can not thus relieve himself from liability for injuries resulting from the tortious acts, or gross negligence, of himself or his servants.—*Story on Bailments*, §§ 507, 549, 554, 570; *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 Howard, 344–83; *Steele & Burgess v. Townsend*, 37 Ala. 254. A reasonable limitation of liability is a very different thing from total exemption from liability: while the former is allowed, the latter is forbidden. If the stipulation contained in the plaintiff's free ticket could be reasonably construed as intended to relieve the carrier from liability for the tortious acts, or gross negligence, of its servants, it would be, to that extent, unlawful and void. But such is not the reasonable construction of the stipulation. It simply means, that the plaintiff assumed the ordinary risks incident to that mode of travel.—6 Howard, 344–83.

3. As to the amount of damages: The limitation of one hundred dollars, as the value of passengers' baggage, if it be a reasonable limitation, and if it were brought home to the knowledge of the plaintiff, could not exempt the carrier from liability for tortious acts,—for actual misfeasance. See authorities above cited.

4. The *onus* of showing a delivery was on the defendant. There was no pretense of a delivery to the plaintiff in person. The effort was to charge her with the delivery to the baggage-master of the steamboat, as her agent. The evidence presented two questions of fact for the determination of the jury: 1st, whether he was her agent; and, 2d, if he was, whether there was a sufficient delivery to him to discharge the defendant from liability. The instructions of the court to the jury, on these points, were certainly as favorable to the defendant as the rules of law warranted. If a railway company allows an agent of another company to receive baggage at their station, they are bound by his acts; and if they employ porters at their stations, to carry passengers' baggage to carriages or other vehicles, they are liable until there has been a proper delivery by the porter.—*Jordan v. Fall River Railway*, 5 Cushing, (Mass.) 69; *Redfield on Railways*, 243; 7 Mann., Gr. & S. 839; 29 Law & Eq. 347. The question of agency was properly submitted to the jury.

JUDGE, J.—The common carrier is subjected by the law to a severe responsibility. He is not only responsible for losses and injuries caused by his negligence, but the law raises an absolute and conclusive presumption of negligence, whenever the loss occurs from any other cause than "the act of God, or the public enemy." And this rule of the law, it is said, is at least as ancient as the reign of Elizabeth.—2 Parsons on Contracts, 158.

This responsibility, being founded on the most salutary grounds of public policy, was originally considered as beyond the reach of the carrier himself, and as beyond the reach of limitation by special contract with the shipper. But we consider it as now well settled, that, while the carrier cannot limit his liability by any general notice, he may

legally contract for exemption from that extraordinary responsibility imposed by the common law, by which he becomes an insurer.—*Steele & Burgess v. Townsend*, 37 Ala. 247. To this extent he may go, in the limitation of his liability, but not further. Public policy forbids that he should be allowed to contract for exemption from liability for damage occasioned by the negligence, willful default, or tort, of himself or his servants.—2 Redfield on Railways, 82-98; 2 Parsons on Contracts, 240-251.

The contract made between appellant and appellee, in the present case, was, that in consideration of a free ticket, or free passage, appellee assumed all risk of accidents, and expressly agreed that appellant should not be liable, under any circumstances, whether of the negligence of its agents or otherwise, for any injury to her person or property. It is contended that, under this contract, appellant does not hold to appellee the relation of common carrier and that "its duty should not be measured by that rule because one element of that relation is wanting—viz., appellant received no reward for the service to be performed."

The relation of common carrier and passenger certainly subsisted between the parties, notwithstanding the contract; but, whether the effect of gratuitous transportation, in such case, is to exempt the carrier from that liability imposed by the common law, by which he becomes an insurer—viz., such as arises from those conclusive presumptions of negligence which are raised by the law in the absence of *non-feasance*, or *misfeasance* and wrong—we need not determine, as no such question is presented by the record. We do hold, however, that it makes no difference whether the service is performed gratuitously or not, in regard to the obligation to perform it well, after it is once entered upon; for, ever since the decision of the leading case of *Coggs v. Bernard*, (2 Smith's Leading Cases, 82,) it has been regarded as sound law, that "the confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it." And we hold further, that, in undertaking the performance of gratuitous transportation, the common carrier can no more stipulate for exemption from liability for damage occasioned by the

negligence, or willful default, or tort, of himself or his servants, than he can when he receives a reward for the service to be performed : both are alike prohibited by a sound public policy, which also forbids a gratuitous bailee, not bound by the considerations of public duty attached to the office of a common carrier, from stipulating that he may be fraudulently negligent, or safely dishonest.

Railroad companies are incorporated, in part at least, from public considerations, and for the public good. As carriers of persons and property, it has been held they may be considered as acting in a public capacity, and as a kind of public officers. The exercise of honesty, care, and diligence, by them or their agents and employees, is a *public duty*, resulting from their position ; the obligation to perform which, cannot be thrown off by contract. If thus thrown off, the effect would be to relax, or modify, the performance of the duty, and to promote a relaxation of proper care in the selection of agents and servants for its performance.

A learned law-writer in his work on contracts, (2 Parsons, 233,) says : “ The more courts have regarded the responsibility of the common carrier as created by the law for *public reasons*, the less willing have they been that it should be placed within the control of one or both the parties, to be modified at their pleasure.” And the fact that the carrier is an artificial person, with no power of action except through its agents and servants, should not confer upon it rights and immunities, in the respect named, superior to those possessed by natural persons.

A case decided in the court of exchequer in England, in 1867, (*Booth v. North Eastern Railway Company*, 2 Law Exchecq. 173,) is analogous in principle to the case in hand. In that case, a contract was made for the conveyance of cattle by railway, which contained the following, amongst other conditions : “ The owner takes all risks of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfection in the station, platform, or other places of loading or unloading, or of the carriage in which the cattle may be loaded or conveyed, or from any other

cause whatsoever." "The company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with, and to take care of them." The action was brought for the failure safely to carry and deliver the cattle. The court held, that the first of the conditions named above "was unreasonable, and that its unreasonable character was not removed by the fact that the company, under the second condition, granted, and the owner accepted, a free pass for a person who travelled with the cattle sent." This adjudication, though made under the influence of the railway and canal traffic act of 17th and 18th Victoria, sustains, in principle, our conclusion as to the character of the contract in the case before us.

It has been held in Indiana, that "an agreement upon a free pass, that the person accepting it assumes all risk of personal injury and loss or damage to property, whilst using the trains of the company, does not exempt the company from liability for gross negligence;" whilst in New York a different rule seems to be recognized.—*Indiana Central Railway v. Mundy*, 21 Indiana, 48; *Wells v. The N. Y. Central Railroad Company*, 24 N. Y. 181. But the decision in New York, above cited, was made by a divided court; and we cannot yield to the opinion of the majority the influence of binding authority, though it is doubtless entitled to great respect. Besides, the decisions in that State have not been uniform on the subject of the liability of common carriers. It seems also to have been, at one time, the doctrine of the English courts, that the common carrier might exempt himself, *by special contract*, from all responsibility whatsoever in regard to goods entrusted to him for transportation. In commenting upon the decisions of the English court upon this subject, Judge Redfield remarks, "It is surely not to be regarded as matter of surprise, that the legislature felt compelled to interfere, to restore something of the responsibility of common carriers."—2 Redfield on Railways, 94. As bearing upon the question involved, see, also, the following authorities: 2 Parsons on Contracts, 222, note e; *Ohio & Miss. Railway v. Mulling*, 30 Ill. 9; *Phil. & Reading Railway v. Derby*, 14 How. (U. S.) 483; *Steamboat New World v. King*, 16 How. (U. S.) 469-474.

It results from what we have said, that the grounds of demurrer to the second and third pleas were well taken, and that there was no error in the rulings of the court thereon.

2. The demurrer to the second and third pleas having been sustained by the court, the parties went to trial on the general issue. We have carefully examined the charges given by the court, to which appellant excepted, as well also as the charges requested by the appellant, which the court refused to give; and construing them in the light of the evidence, we hold, without entering into a minute consideration of them all, that there is no error in any of the rulings of the court thereon, prejudicial to the appellant.

As to the charge given by the court, and the charge requested by the appellant and refused, relating to the right of appellant to make reasonable limitations as to the extent of its liability for baggage entrusted to it for transportation, the purposes of this case require us to go no further, than to repeat what we have already said in substance—viz, that no such limitation can be made by any general notice—that it may be made by special contract, but that a common carrier can not exempt himself, by any such contract, from liability for the negligence, willful default, or tort, of himself or his servants; and this upon the familiar principle, that whatever has an obvious tendency to encourage guilty negligence, fraud, or crime, is contrary to public policy.—*Camden & Amboy Railway v. Baldauff*, 16 Penn. St. 67.

3. The only other rulings of the court excepted to, relate to the question, whether the appellant safely carried and delivered the baggage to the appellee, at Columbus, Kentucky. This was all the appellant was bound by its original undertaking to do; and whether it discharged the duty or not, was, substantially, a question of fact to be decided by the jury. They found the fact against the appellant, and we can not revise this finding of the jury on the evidence. The most we can do is to determine whether or not the court erred in its rulings upon the law applicable to the question; and if it did, we are satisfied the error was not prejudicial to, but in favor of the appellant.

We had some doubt, at first, whether the second charge

requested by the appellant, and refused by the court, should not have been given. A closer scrutiny, however, has relieved us of the doubt. It was a controverted question in the case, whether the baggage-master of the steamboat company was the agent of the appellee, to receive her baggage at the depot of appellant, or whether he was not the agent of appellant, by agreement with the steamboat company, to take charge of the baggage and deliver it at the boat. If he was not the agent of the appellee to receive her baggage, it was insisted that it had never been delivered to her at Columbus, pursuant to the original undertaking; and the burthen of proving such delivery rested upon the appellant. If the second charge had been given as asked, the court would, in effect, have withdrawn from the consideration of the jury the question of fact, as to whose agent the baggage-master of the steamboat company was, in receiving the baggage of appellee, or would have usurped the province of the jury by deciding, in effect, *that he was the agent of the appellee*.

For this if no other reason, said charge was properly refused. If the baggage of appellee was not delivered to her, or her agent, at the depot of appellant, but was placed by appellant in charge of the baggage-master of the steamboat company, to be delivered at the boat; and if such baggage-master was authorized, by agreement between appellant and the steamboat company, to receive upon the trains, or at the depot of the former, the baggage of through passengers, to be delivered at the boat; and if such was appellant's usual mode of delivering the baggage of through passengers travelling in that direction; then the larceny of the baggage by appellant's servants, by reason of which it was not delivered at the boat, but lost to the appellee, renders the appellant responsible for the loss, although appellee was travelling over the road of appellant on a free ticket, and although appellant might have discharged its original obligation by a proper delivery of the baggage at the depot.—*Richards v. The London, &c., Railway Company*, 62 Eng. Com. Law Rep. 837; *Butcher v. The London, &c., Railway Company*, 29 Eng. Law & Eq. Rep. 347.

The judgment is affirmed.

CITY COUNCIL OF MONTGOMERY *vs.* VAN DORN.

[GARNISHMENT ON JUDGMENT.]

1. *Liability of municipal corporation to garnishment.*—Under the provisions of the act approved February 22, 1866, (Revised Code, § 2895,) process of garnishment lies against a municipal corporation, to subject the wages or salary of a policeman to the satisfaction of a judgment obtained against him.
2. *Answer of such corporation.*—Under the provisions of this statute, the answer of the corporation is not required to be under its corporate seal, but may be made by the treasurer, upon whom the garnishment is served.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

THE facts of this case are thus stated in the bill of exceptions: "The plaintiff regularly obtained a judgment, before a justice of the peace, against J. D. Kirby, for fifty-one dollars and fifty cents, and, before the issue of any execution on said judgment, sued out process of garnishment, in due form, and in strict accordance with law, against the city council of Montgomery; which garnishment was regularly served on the treasurer of the city of Montgomery. Said city council duly appeared, by its treasurer, before the justice, and objected to making answer in the case, on the ground that said city could not be garnisheed in such a case; and on the further ground, that said Kirby was one of the police guard of the city, and that his wages could not, for reasons of public policy, be thus attached in such a case. The justice overruled these objections on the part of the city, and ordered the garnishee to answer. Said city council, by its treasurer, then requested of the justice time to ascertain the precise indebtedness of said city to said Kirby, as no warrant had been drawn on him, through the clerk, for the wages of said Kirby. Afterwards, said treasurer appeared, and answered, (but not under the proper corporate seal of said city council,) that said city council was indebted to said Kirby in the

sum of eighty dollars, for his monthly wages as a police guard of said city, but not otherwise, and had no effects of said Kirby in his possession, or under its control. The justice thereupon rendered judgment against said city council, for the amount of said original judgment and costs; and from this judgment said garnishee appealed to said city court, and there insisted on its exemption from said garnishment process on the facts above stated. Whereupon, the court decided, that said city council, on the facts stated, was subject to the process of garnishment, and that the salary of a police guard of said city might be subjected, by process of garnishment against said city council, to the payment of a judgment recovered against such policeman; and accordingly rendered judgment," &c. The plaintiff's original judgment before the justice of the peace was rendered on the 29th December, 1866; the garnishment was sued out on the 31st December, 1866; and the judgment of the city court, on the appeal, was rendered on the 20th March, 1867. An exception was reserved, on the part of the said city council, to the decision and judgment of the city court, and the same is now assigned as error.

V. S. MURPHEY, for appellant.—1. Process of garnishment does not lie against a municipal corporation, to subject the salary of one of its police officers.—*Mayor and Aldermen of Mobile v. Rowland & Co.*, 26 Ala. 498. The act of February 22, 1866, while authorizing writs of garnishment, does not mention policemen, and does not change the manner in which garnishees shall answer. It is contrary to public policy.—*Wicks v. Br. Bank at Mobile*, 12 Ala. 594; *Hawthorn v. St. Louis*, 11 Mo. 59; 2 Mass. 37.

2. A corporation can only answer process of garnishment under its corporate seal.—*P. & M. Bank of Mobile v. Leavens*, 4 Ala. 753; *Br. Bank at Mobile v. Poe*, 1 Ala. 796; 12 Grattan, 655.

CUNNINGHAM & GRAVES, *contra*.—The act approved Feb. 22, 1866, was obviously intended to change the rule of law which had been established by the previous decisions of this court. It is general in its terms, and makes no excep-

tion in favor of any particular class of debts or debtors. Questions of public policy and expediency are matters for the determination of the general assembly, and can only be decided by the courts from constitutional and statutory provisions.—*Atwood's Heirs v. Beck*, 21 Ala. 590; *Tannis v. Doe, d. St. Cyre*, 21 Ala. 449. Similar statutes have been construed, in other States, to extend the remedy.—*Whidden v. Drake*, 5 N. H. 13; *Bray v. Wallingford*, 20 Conn. 416; *Wales v. Muscatine*, 4 Iowa, 302.

A. J. WALKER, C. J.—The question of this case is, whether the wages of a "police guard" of an incorporated city can be condemned in the hands of the municipal corporation, by garnishment, to the payment of a judgment against such guard. This question was presented in the case of *The Mayor of Mobile v. Rowland & Co.*, (26 Ala. 498,) and was decided in the negative. The decision was based upon two independent and distinct reasons. Those two reasons were—that the statutes of garnishment could not be applied to corporations, which, from their impersonal, artificial character, could not be sworn; and that, upon a principle of public policy, the wages of an officer of a municipal corporation, exercising governmental authority, could not be taken by garnishment. This decision was commented upon in *Smoot v. Hart*, (33 Ala. 69,) and one of the grounds, upon which the above stated principle of public policy was placed, was repudiated. This ground was, that the liability to garnishment of the officers of a municipal corporation would prevent the discharge of their duties to the public. The decision itself, in the case of *The Mayor v. Rowland*, as to both the reasons upon which it was put, was left unaffected. It was restricted only in the scope of its argument in support of the second reason. The law, as established by these decisions, was, that no corporation, private or municipal, could be garnisheed, because it could not appear and make the affidavit contemplated; and secondly, that a municipal corporation could not be garnisheed, as a debtor for the wages of one of its officers, for the reason already given, and for the additional

reason, that a principle of public policy would thereby be violated.

The law thus remained, until the act of 9th January, 1856, (Revised Code, § 2897,) was adopted. That act made private corporations amenable to process of garnishment, and provided a mode of making the required affidavit. Afterwards, the case of *Clark & Saunders v. School Commissioners*, (36 Ala. 621,) was decided. In that case, the statute of 1856, subjecting private corporations to garnishment, was alluded to; and it was held, that the authority of *The Mayor v. Rowland & Co.*, (*supra*,) remained unimpaired. This decision was followed by the act of 22d February, 1866, (Revised Code, § 2895,) whereby it was enacted, that upon all judgments and decrees in any court of this State, the plaintiff should have process of garnishment against any municipal corporation, supposed to be indebted to the defendant, upon a compliance with the law in other cases of garnishment. This statute provides a mode in which the sworn answer of such corporation might be made. Now, the object of this law obviously was, to overthrow the doctrines of the case of *Mayor v. Rowland*, so far as they were unimpaired by the act of 1856, and had been reasserted in the case of *Clark & Saunders v. Mobile School Commissioners*. This is very clearly indicated by the comparison, above made, of the history of the adjudications and legislation upon this subject. The public good, in the estimation of the legislature, would be promoted by the reversal of the judicial exposition of the law; and that, we think, it aimed to effect.

Aside from the consideration thus presented, the act of 1866 is, when closely examined, susceptible only of such a construction, as subjects the wages of the officers of municipal corporations to garnishment. Its language, in general terms, subjects to process of garnishment any municipal corporation, indebted to the defendant. Upon what ground could we select any particular class of debts, and except them from the operation of a statute, the language of which is sufficiently comprehensive to include them, or interpolate an exception or qualification upon a statute, not

suggested by the context? To do so, would involve a clear departure from the judicial authority of construction.

Furthermore, it must be observed, that the act of 1866 requires of the plaintiff, as the preliminary to the issue of a garnishment, only a compliance with the law in other cases of garnishment. The law, in other cases of garnishment, required an affidavit that the garnishee was supposed to be indebted to the defendant. If it be that the wages of its officer, owed by a municipal corporation, cannot be reached by garnishment, it results, that the preliminary affidavit may be true, and there may be a correct compliance with the prescribed condition of the issue of the garnishment; and yet the plaintiff be not entitled to the process. To carry out the argument of the appellant, and make the law consistent with itself, it would be necessary to add a clause to the affidavit, so as to make it read, that the garnishee "is supposed to be indebted" to the defendant, *otherwise than for his wages as an officer*. We must decline to make the perversion of the law, which an exemption from garnishment of a debt due by a municipal corporation to one of its guards would effect.

2. Under the act of 1866, the rule which would have required an answer, under the corporate seal, is changed, and the answer is required to be made by the designated officer. The answer here is by the proper officer.

The question of the sufficiency of the affidavit and garnishment to require an answer from the corporation, or its treasurer in his official capacity, was not raised in the court below. We mention it to exclude the conclusion that we decide it.

Affirmed.

MORRIS *vs.* HALL.

[TROVER FOR CONVERSION OF COTTON.]

1. *General charge on evidence.*—Repeated decisions of this court have established the propositions, that a general charge on the effect of the evidence, in favor of either party, is equivalent to a demurrer to the evidence; and that such a charge should never be given, where there is any conflict in the evidence on a material point; nor where it is necessary to draw an inference of fact, which the jury only can draw from the evidence, and which does not arise as a legal presumption from the facts proved; nor where the evidence only tends to prove the facts on which such charge is based; and the court is now prohibited by statute, (Code, § 2274; Revised Code, § 2678,) from giving such a charge, *ex mero motu*, in any case.
2. *Purchase of cotton by foreign bank, during late war, with Confederate States treasury-notes; validity of contract.*—The purchase of cotton by a foreign banking corporation, in this State, is not an exercise of "the privilege of banking," within the meaning of section 939 of the Code, (Revised Code, § 1176,) which requires such corporations to exercise that 'privilege "by the exclusive use of gold and silver coin and bank-bills issued by authority of this State;" consequently, the contract for such purchase is not void under the provisions of that statute, because the price was agreed to be paid, and was paid, in treasury-notes of the Confederate States; but such contract is void under the laws of the United States, and the proclamations of the president issued in conformity thereto, (12 U. S. Statutes at large, 257, 1264, 1267,) when shown to have been made in Alabama, in December, 1862, after the capture of New Orleans by the Federal forces, by a banking corporation which was chartered under the laws of Louisiana, and which was located in New Orleans.
3. *Extra-territorial contract by corporation.*—*Semble*, that a corporation can not do any act, nor make any contract, outside of the limits of the State by which it is created, unless the power to do so is expressly conferred by its charter.
4. *Delivery of possession under invalid contract; estoppel en pais.*—If the vendor of a chattel receives payment of the purchase-money, and delivers possession of the property to the purchaser, he can not be heard, in a court of law, to assert the invalidity of the contract as a ground of recovery, whether such invalidity arises from the illegality of the consideration, or from the legal incapacity of the purchaser to make the contract.
5. *Replevy of attached property by stranger; liability of person replevying in trover, and what defenses he may make.*—When attached property is

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replevied by a stranger, for the defendant, (Code, § 2536; Revised Code, § 2964,) and the person so replevying is sued in trover, he may set up any defense that would be available to the defendant in attachment; and if he so replevies the property in good faith, without any knowledge or notice of the title of the real owner, and afterwards holds in subordination to the bailment, and does no act inconsistent with his duty as such bailee, he is not liable in trover.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

THIS action was brought by William B. Hall, against Josiah Morris, W. C. Ray, A. F. Given, E. H. Metcalf, and D. Browder, to recover damages for the conversion of one hundred and twenty-five bales of cotton; and was commenced on the 19th January, 1866. The defendants severally pleaded the general issue, "in short by consent, with leave to give in evidence any matter that might be admissible under that issue, or under any special plea in bar; and the plaintiff joined issue, with like leave to give in evidence any matter that could be legally admitted, in avoidance or rebuttal of any matter which might be shown in evidence by the defendants." The cotton in controversy was sold by the plaintiff, through Edmund Harrison, his agent and commission-merchant, in Montgomery, in December, 1862, to W. C. Ray, a cotton-broker, who bought it for one Steever, as agent for the Bank of Louisiana; the agreed price being fifteen cents per pound, and the entire purchase-money being paid at the time, in Confederate States treasury-notes. By agreement between the parties to the contract, the cotton remained on the plaintiff's premises, where it was at the time of the sale; and an attachment was there levied on it, in July, 1865, as the property of the bank, at the suit of one Edward H. Wilson. In January, 1866, the defendant Morris replevied the cotton; and his co-defendants, Ray, Given, Metcalf, and Browder, were his sureties on the replevin bond. The proceedings in said attachment suit, which were read in evidence on the trial, are hereinafter more particularly described. On the trial, at the June term, 1867, there was a judgment on verdict for the plaintiff; but, on a subsequent day of the term, the court granted a new trial, as to all the defendants except Morris.

"On the trial," as the bill of exceptions states, "the plaintiff testified as a witness, that he was a resident citizen of Lowndes county, Alabama, and had resided there before, during, and since the war between the United States and the Confederate States; that on the 6th December, 1862, (while he was absent in the service of the Confederate States,) he sold one hundred and thirty-four bales of ginned cotton, being all of his crop raised in the year 1862, and being by itself in a shed on his plantation, through Edmund Harrison, his agent and commission-merchant, then doing business in the city of Montgomery; that the agreed price was fifteen cents per pound, and the aggregate amount \$11,088.30, the aggregate weight of the cotton being 73,922 pounds; which cotton, as he understood from said Harrison, was sold to W. C. Ray, a cotton-broker, for one Steever, who, in said purchase, was agent for the Bank of Louisiana, located at New Orleans; and said Ray paid to said Harrison, at the time of said purchase, the amount of said purchase-money, in Confederate States treasury-notes; which notes were received by said Harrison, and were afterwards paid over by him to plaintiff. Said plaintiff further testified, that the price paid for said cotton was the usual market price for cotton of that quality at the time of the sale, and that he was satisfied with the sale; also, that it was understood that the cotton should remain where it was, at the risk of the bank, until called for by the bank, and he was to see that proper care was taken of it while there; also, that if it had been burned, it would have been, in his opinion, the loss of the bank, and not his. He further testified, that afterwards, about the 12th July, 1865, F. C. Randolph called on him, in Lowndes county, and asked if the Bank of Louisiana had not some cotton on his premises; that he replied in the affirmative; that Randolph then said, he had a writ of attachment against said bank, in favor of Edward H. Wilson, which he had come to levy on said cotton, as the property of the bank, and asked him (witness) to point out the cotton; that he agreed to do so, but first requested Randolph to go and take dinner with him, and that they would then go down to the shed near the river, where the cotton was, about three miles from

his residence, and he would point out the cotton ; that they both rode down to the place after dinner, and he pointed out the cotton ; that Randolph rode around it, and said he levied on it, and asked him to see that it was not interfered with ; that he agreed to do so ; that said Wilson afterwards sent down an agent to look after and care for the cotton, and made an arrangement with witness himself to guard it ; that the defendant Morris, after replevying the cotton, sent him a note, stating that he would pay for guarding the cotton, and for putting it in order, and requesting him (witness) to have it moved to the river bank, after it was repaired, for shipment by steamboat ; that he (witness) did so, and for which said Morris afterwards, on the 28th May, 1866, paid him the sum of four hundred and twenty-five dollars and twenty-five cents, in United States currency. The receipt for said amount was shown to said Hall, and was read to the jury, after being proved by him, as follows." The receipt, as set out in the bill of exceptions, is signed "W. B. Hall, by T. Douglass, agent ;" and one of the items specified in the account is, "T. Douglass' attention to cotton, \$90."

"Said Hall further testified, that said Douglass, while guarding and attending to said cotton, was in his employment, and was duly authorized by him to collect from said Morris the money mentioned in said receipt, and to sign said receipt ; that he (witness) knew, at the time of the repairing and hauling of said cotton mentioned in said receipt, that said Morris had replevied said cotton under the levy made by said Randolph, and the orders of the circuit court of Montgomery, in the said suit of E. H. Wilson against the Bank of Louisiana, (as hereinafter more fully appears,) and that said Morris neither had nor claimed any right to said cotton, or any control over it, other than such as he derived and acquired from his having replevied the same in said suit. Said Hall further testified, that when he came home from the army, in 1863, he was fully informed by said Harrison of said sale to Ray, and of the terms of said sale, and of all the facts relating to it ; that thereupon, with a full knowledge of all these matters, he ratified and approved the said sale, and received and enjoyed the ben-

efit of the proceeds thereof, and had never returned, nor offered to return, any part of the proceeds of said sale; that from the time he first heard of said sale, until some few days before the commencement of this suit, he had uniformly and frequently spoken of said cotton as the property of said bank, and had so regarded it; that he had never paid any internal-revenue tax, or other tax on it, but the same had been paid by the bank, or by those acting or claiming under it; that he was informed by an attorney-at-law, a few days before the commencement of this suit, that, as the Bank of Louisiana was located at New Orleans, and continued its business there after the capture of that city by the United States forces, the sale to said bank was illegal and void, and he could probably recover the cotton by suit; that he commenced this suit on such information; that on the morning of the commencement of the suit, but before the issue of the summons and complaint, a demand for said cotton was made by his authorized agent, of said Morris, plaintiff claiming it as his own at the time; that said Morris thereupon refused to deliver it, and stated that, as he held the cotton under said replevy, he could not deliver it to said plaintiff or his agent; that this suit was thereupon immediately commenced; that said cotton had never been out of his possession, from the time it was ginned and packed into bales, until it was taken by said F. C. Randolph as aforesaid, otherwise than is shown in this bill of exceptions; and that no actual delivery of the cotton had ever been made to the Bank of Louisiana, or its agents, otherwise than is shown in this bill of exceptions."

The plaintiff then read in evidence the depositions of Henry Shepherd and John F. Irwin; the former of whom was a director in the Bank of Louisiana, after the capture of New Orleans by the United States forces, in April, 1862; while the latter was a clerk in said bank at that time, and was elected cashier in March, 1864. Both of these witnesses testified, that after the capture of New Orleans, on the 28th April, 1862, the bank ceased its regular banking business; that all the business afterwards transacted by it, was done with a view to the liquidation and settlement of

its affairs, and that its charter had never been declared forfeited.

"The plaintiff then introduced said Edmund Harrison as a witness, who testified as follows: Before the 6th December, 1862, it was communicated to him by plaintiff's agent, that plaintiff had one hundred and thirty-four bales of cotton, which were piled up under a shelter on his plantation in Lowndes county, and which he (witness), as plaintiff's agent and commission-merchant, was authorized and requested by plaintiff to sell by sample, for Confederate treasury-notes, to any person who would buy and take them as they were under the shelter, in accordance with the usage and custom in such cases at the time; and, in pursuance of the authority given to him, he sold said bales of cotton, which weighed in the aggregate, seventy-three thousand nine hundred and twenty-two (73,922) pounds, on the 6th December, 1862, to W. C. Ray, a cotton-broker, in the city of Montgomery, who bought the same for the Bank of Louisiana, at the price of fifteen cents per pound, as the same were under said shelter, and who, on said day, paid witness in full therefor, to-wit, \$11,088.30. At the time of said sale and payment, in pursuance of the authority given to him by plaintiff, and in accordance with the usage and custom in such cases, witness delivered to said Ray, acting for said bank as aforesaid, the samples of said cotton, (by which samples the sale had been made,) and executed and delivered to said Ray, acting for said bank, an instrument in writing, which, in substance, set forth the sale and payment aforesaid, and contained a provision, in addition thereto, that said bales of cotton were to remain under said shelter, and be held and kept there as the property of said bank, and at the risk of said bank, subject to the order or removal of said bank or its agent; and said cotton was to be delivered by plaintiff, whenever called for by said bank or its agent. Very soon afterwards, the said transaction, including said sale, payment, and substance of said writing by witness for plaintiff, was duly reported to plaintiff, and was approved by him not long afterwards; and the money so received by witness was accounted for by him, and paid over to plaintiff, who received the same with-

out objection. Said witness testified, also, that said cotton was worth, on the 19th January, 1866, in lawful money of the United States, from thirty to forty-five cents per pound.

“The plaintiff also introduced T. Douglass as a witness, who testified, that he was plaintiff’s agent to do the work specified in the receipt above set out, and was in his employment; that he was duly authorized by plaintiff to execute said receipt in his name, and to receive the money specified in said receipt; that the labor and service therein specified, had been done and performed as therein specified; that he was doing business for plaintiff at the time of the sale of said cotton, and continued in his employment up to the time of the trial; that from the time of the sale of said cotton, to the 19th January, 1866, plaintiff uniformly spoke of said cotton, and treated it, as the property of said bank; that he never heard plaintiff set up any claim to it in any wise; that it was kept under shelter, by itself, from the time of said sale, until hauled away at the request of said Morris; that he, having said cotton under his care during the plaintiff’s absence in the military service of the Confederate States, regarded and treated it as the property of said bank; that the plaintiff paid no tax on said cotton after said sale, but the same was paid by the agent of said bank. Said witness further stated, that on the written request of said Morris, made to said plaintiff, he, by the direction of said plaintiff, caused said cotton to be hauled to the landing on the river, for shipment by said Morris, who caused the same to be shipped from said landing; that it was hauled there for said Morris, who claimed it under his replevy; that the said claim of said Morris was yielded to by plaintiff without objection, and said cotton was hauled by plaintiff for said Morris, for the compensation paid by said Morris as aforesaid.

“The defendants introduced as a witness W. C. Ray, who was one of the defendants, and who testified, that on the 6th December, 1862, having been requested to purchase some cotton for the Bank of Louisiana, he, as broker and agent for said bank, purchased from said plaintiff, through his agent and commission-merchant, Edmund Harrison,

one hundred and thirty-four bales of cotton, at fifteen cents per pound; that the sale was made in the city of Montgomery, by samples; that the aggregate weight of said cotton was 73,922 pounds, and he paid for it, in Confederate States treasury-notes, the sum of \$11,088.30; that said bales of cotton were on plaintiff's plantation, under a shelter by themselves; that said Harrison, as agent of plaintiff, executed to him the usual and customary writing, acknowledging the sale of said cotton, and the receipt of said money from the bank, and agreeing that the cotton should remain under said shelter, as the property of said bank, and at its risk, and subject to its order, said Hall to care for it while it remained, and to deliver it to the order of said bank; that there was no actual delivery to said bank, other than herein shown; that after the close of the war, and before any attachment had been levied on the cotton, some time in 1865, said witness, in company with Mr. Steever, the agent of said bank, went around to see the cotton purchased for said bank, to examine into its condition, and to see what repairs were necessary to put it in good condition for shipping; that they saw the plaintiff, and made inquiry of him as to said one hundred and thirty-four bales, and told him their object was to see what it would cost to put it in repair; that plaintiff informed them of the condition of the cotton, spoke of it as the cotton of the bank, laid no claim whatever to it, expressed a willingness to have it repaired, at a reasonable cost to the bank, and said that he would deliver it to the bank when called for; that no agreement was made at the time, as they were some distance from where the cotton was, and they did not see it at that time; that the cotton was levied on soon afterwards, as the property of the bank, and he (witness) took no further steps in relation to it, and never interfered with it afterwards; that the samples of said bales were delivered to him at the time of said sale, but no actual delivery of the cotton was made, unless what is shown in this bill of exceptions is equivalent to such delivery.

"Josiah Morris, one of said defendants, was next introduced by the defendants, and testified, that he replevied said cotton on or about the 8th January, 1866: that he ad-

dressed a note, immediately afterwards, to plaintiff, requesting him to put said cotton in order, and to haul it to the river, for shipment by said Morris, who had replevied it under the attachment of E. H. Wilson against said bank; that plaintiff consented to do so, and proceeded to put said cotton in repair, and to haul it to the river, and place it in the possession of said Morris; that said Morris afterwards paid plaintiff for it, upon his demand, as shown by the receipt above set forth in the testimony of said Hall; that said Hall never set up any claim to said cotton, nor gave witness any intimation that he intended to claim it, until the day on which this suit was instituted, and just before it was instituted, but acknowledged and treated said cotton as the property of said bank; that he (witness), as the party replevying said cotton, paid said Hall, soon after the commencement of this suit, the money mentioned in said receipt, for the services therein mentioned, which were rendered at the dates therein shown; that in order to protect said cotton, and preserve it subject to his bailment, as the person who had replevied it, he had incurred heavy expenses in insurance, taxes, guarding, freight, &c.; and that he had refused to deliver it up, on the demand of plaintiff through his agent, Mr. Randolph.

"The defendants then read in evidence a transcript, duly certified, of all the papers, orders, bonds, and proceedings in the circuit court of Montgomery, in the said attachment suit therein pending, wherein said Edward H. Wilson is plaintiff, and said Bank of Louisiana is defendant;" which transcript is copied into the bill of exceptions. The attachment in said suit was issued on the 10th July, 1865, by J. H. Nettles, a justice of the peace in and for Montgomery county, under the authority of an order from Major-General A. J. Smith, who was then in command of the sixteenth corps of the United States army, with his headquarters at Montgomery; which order was addressed to "J. H. Nettles, justice of the peace in and for Montgomery county," and was in these words: "You are hereby authorized to issue a writ of attachment, at the suit of E. H. Wilson, against the Bank of Louisiana, and appoint the necessary bailiffs to execute the necessary process, levying

the same upon any property of said bank within your jurisdiction, upon proper affidavits and bond being filed with you. You will make the writ returnable to the first properly organized court under the laws of the United States, having jurisdiction in such cases." The affidavit for the attachment was made by the plaintiff, before said Nettles; and stated, as the ground on which the attachment was sued out, that the defendant had not sufficient property in Louisiana, with which to satisfy the plaintiff's debt. The usual statutory bond was given by the plaintiff, and the attachment was made returnable to the next term of the circuit court of Montgomery county. The plaintiff's demand, as stated in his affidavit for the attachment, was "the sum of ninety-three thousand four hundred and twelve 50-100 dollars, in coin, after allowing all off-sets and discounts." W. H. Ogbourne was appointed bailiff by said Nettles to execute said attachment in Montgomery county, and F. C. Randolph was appointed bailiff to execute branch writs, which were issued to Autauga and Lowndes counties. The order appointing said Randolph was as follows: "You are hereby appointed a bailiff to execute and return the branch writ of attachment in said cause, in the counties of Lowndes and Autauga. You will execute and return the same according to law and the precept thereof. You are appointed under authority vested in me by the order of Major-General A. J. Smith, commanding 16th army corps U. S." The attachment was levied by said Ogbourne, on the 11th July, 1865, on thirty-four bales of cotton on the plantation of A. W. McDade, one hundred and ninety-eight bales on the plantation of J. C. B. Mitchell, and thirty-seven bales on the plantation of W. E. Lucas, all in Montgomery county. The branch writ to Autauga was levied by said Randolph, on the 12th July, 1865, on one hundred and five bales of cotton on the plantation of T. F. Friths, fifty-three bales on the plantation of Mrs. M. F. Pope, and fifty-nine bales on the plantation of A. J. Pickett, deceased; and the branch writ to Lowndes county was levied by said Randolph, on said 12th July, 1865, on one hundred and thirty-four bales of cotton on the plantation of W. B. Hall,

(the plaintiff in this suit,) and also on fifty bales on the plantation of J. Bragg in said county.

At the fall term, 1865, of said circuit court, the plaintiff filed his complaint in said attachment suit. The complaint contained three counts; the first count being founded on four bills of exchange, which were therein set out in full, together with the contract in writing between said Wilson and the cashier of said bank, under which said Wilson received said bills of exchange; the second count being also founded on the non-payment of the said bills of exchange, and alleging an excuse for the failure to protest the same; and the third being the common money counts combined. The bills of exchange were all dated at New Orleans, 11th October, 1862; were drawn by "Aug. Montrieul, cashier," on "R. M. Davis, president, Columbus, Georgia," payable at sight, "in coin," to the order of E. H. Wilson; three of them being for twenty-five thousand dollars each, and the fourth for thirty-five hundred and eighty-one 62-100 dollars. The contract under which said Wilson received said bills of exchange, which was also dated New Orleans, October 11, 1862, requires no special notice.

At the December term, 1866, Martin & Sayre, attorneys-at-law, as *amici curiæ*, moved the court to dismiss the attachment, on the ground that said Nettles had no authority to issue it, and also to dismiss the levies, on the ground that the bailiffs had no authority to make them; both of which motions were overruled by the court. At the same term of the court, it was ordered, on motion of the plaintiff, that the cotton be delivered by the bailiffs into the possession of the sheriffs of the several counties in which it was, and directing the sheriffs to sell it as perishable property; and, on a subsequent day of the term, it was further ordered, "that the several sheriffs allow the right to replevy, if good and sufficient bond or bonds for that purpose shall be offered." Under these orders, the cotton was delivered to the sheriffs of Montgomery, Lowndes, and Autauga counties; and it was replevied by the defendant Morris, as above stated, on the 10th January, 1866; the number of bales marked with the plaintiff's name being stated in the replevin bond to be one hundred and twenty-five. At the

May term, 1866, a plea in abatement was filed by the defendant, on the ground that the attachment was issued without authority of law, and that the levy thereof was also unauthorized and invalid. At the June term, 1867, as is shown by a bill of exceptions in the transcript, the court struck from the files, on motion, *four* pleas in abatement, which are said to have been filed by the defendant, but which are not copied in the record; and also sustained a demurrer to several special pleas in bar, none of which are set out. A trial was had at the same term, on issue joined on the plea of *non assumpsit*, which resulted in a verdict and judgment for the plaintiff.

“The foregoing was all the evidence introduced on the trial of the cause; and upon this evidence the counsel for the respective parties proceeded to discuss the questions thereon arising. The defendants’ counsel closed his speech, by asking the court to charge the jury, that, if they believed all the evidence, they must find for the defendants. Whilst the counsel for the plaintiff, in the closing argument, was proceeding in this discussion, he took the position, that the sale by Harrison to said bank was illegal, and was neither accompanied nor followed by any actual delivery of the cotton, either to the bank, or to any one for it, on the part of the plaintiff; and that the contract of sale was therefore executory, and not executed, and could not avail the defendants as a bar to this action; and while he was arguing in favor of this position, the court interrupted him, and informed him that the court would charge the jury, that, if they believed all the evidence, they must find for the plaintiff, for the value of the cotton on the day of said demand on and refusal by said Morris, with interest thereon from that day up to the day of rendering their verdict. The plaintiff’s counsel thereupon stopped his argument, and the court gave said charge to the jury; to which charge, thus given, the defendants severally excepted.”

The appeal is sued out by the defendant Morris, who assigns as error the charge to the jury, the final judgment, and the order refusing to grant him a new trial.

RICE, SEMPLE & GOLDTHWAITE, and CHILTON & THORINGTON, for the appellant. (No briefs on file.)

WATTS & TROY, with whom were TYLER & RANDOLPH, *contra*, made the following points: 1. The contract between Hall and the Bank of Louisiana, made through their respective agents, was void, on several distinct grounds. In the first place, if buying cotton was a part of the bank's legitimate banking business, the contract was void under § 939 of the Code, (Revised Code, § 1176,) because the price was paid, and agreed to be paid, in treasury-notes of the Confederate States, whose issue was not authorized by the laws of Alabama; and if buying cotton was not a part of the bank's legitimate business, the contract was nevertheless void, because it was not shown that the bank's charter authorized it to make such a contract. As to the power of corporations to make such contracts, see Angell & Ames on Corporations, page 2; *Dartmouth College v. Woodward*, 4 Wheaton, 636. The *onus* of showing the authority of the bank to make the contract, was on those who asserted it. *City Council of Montgomery v. M. & W. P. R. R. Company*, 31 Ala. 7; *Grand Lodge v. Waddell*, 36 Ala. 313; *Bryan v. Carter*, 13 Peters, 129.

2. Said contract was void, for the further reason, that it was violative of the laws of war, and contrary to the public policy of the United States, as well as the proclamations of the president, and the express provisions of several acts of congress. The Bank of Louisiana was chartered under the laws of Louisiana, and was located at New Orleans; and that city was captured by the military forces of the United States, on the 25th April, 1862. By the laws of war, all the inhabitants of one belligerent nation are forbidden to hold commercial or other friendly intercourse with the subjects or inhabitants of the opposing belligerent power.—1 Kent's Commentaries, 67; *Griswold v. Waddington*, 16 John. 438; Wheaton's Law of Nations, 366, 372, 385-6; Story's Conflict of Laws, 246-7; *Williams v. Patterson*, 7 Taunton, 439; Chitty on Contracts, 181-83, 678; and Phillimore and Vattel, as cited in these authorities. A corporation is an inhabitant, within the meaning of this

rule of law.—2 Gallison, 105. The principle applies with peculiar force to the inhabitants of a conquered province or territory, during the progress of the war.—*Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch; *Fleming v. Page*, 9 Howard; 1 Robinson's Adm. Rep. 196-208; 3 *ib.* 22; 1 Kent, 66-8; *United States v. Rice*, 4 Wheaton, 253; *Williams v. Patterson*, 7 Taunton, 439; *Prize Cases*, 2 Black, 635; *Mrs. Alexander's Cotton*, Wallace, —. Moreover, these principles of law were expressly declared and promulgated, as applicable to the inhabitants of any conquered territory during the late war in the United States, both by act of congress, and by the president in official proclamations.—12 U. S. Statutes at large, 257, 1262, 1264.

3. The contract being void, the Bank of Louisiana never acquired any title to the cotton by virtue of that contract. The actual possession and dominion of the cotton never passed from Hall. The delivery of the samples was but a constructive, or symbolic, delivery of the cotton; and there can be no constructive delivery under a contract which is illegal and void. The alleged bailment, growing out of Hall's agreement to hold the cotton for the bank, was founded on the same void contract, and could have no more validity or efficiency. Hall held the cotton as if no contract whatever had been made in reference to it.—*Harris v. Dodson*, 10 Ala. 566; *Hockaday v. Willis*, 1 Speer, 379; *Armstrong v. Toller*, 11 Wheaton.

4. A delivery of the cotton to the bank can not be argued from Hall's declarations to Randolph, when making the levy, and his accompanying acts, pointing out the cotton, &c. If Randolph had been a legal officer, with authority to make the levy, he certainly did not act as the agent of the bank in levying on the cotton; and if he was not a legal officer, or had no authority to make the levy, (*vide infra*,) he was a mere trespasser, and no right could grow out of his illegal act. The plaintiff's declarations to Randolph amounted to no more than the expression of an opinion, at that time entertained by him, that the cotton belonged to the bank.

5. The case presents none of the elements of an estoppel. To constitute an estoppel *en pais*, there must be—1st, mis-

representation by a party having knowledge of the facts ; 2d, that the opposing party, having no knowledge of the facts, and no means of information, was induced by these misrepresentations to do what he would not otherwise have done ; and, 3d, that injury would not result from the assertion of the truth.—*Pounds v. Richards*, 21 Ala. 424 ; *Steele v. Adams*, 21 Ala. 534 ; *Commonwealth v. Moltz*, 10 Barr, 527. None of these ingredients exist in this case : Morris had all the information, when he replevied the cotton, which the plaintiff ever had ; he was not in any manner influenced, in replevying it, by anything that the plaintiff had said or done. He can not occupy a better position, in any respect, than the bank would have occupied, if it had replevied the cotton ; and it can not be contended that the plaintiff would have been estopped from suing the bank, by anything that he said or did at the time of the levy. Suppose that Hall is estopped from recovering against Morris, and that Wilson fails in his attachment suit ; what becomes of the cotton ? If Hall's consent to the levy, and his subsequent act in hauling the cotton to the river, would prevent him from maintaining trespass against the officer, or against any one claiming under the levy, they can not affect his right to recover in detinue or trover.—*Smith v. Locke*, 4 Ala. 288 ; *Lindsay v. Bissell*, 9 Ala. 166 ; *Easley v. Dye*, 14 Ala. 165 ; *Oden v. Stubblefield*, 2 Ala. 684. On the question of estoppel, see, also, *Miller v. Hampton*, 37 Ala. 342 ; *Hill v. Eply*, 31 Penn. St. 331.

6. Randolph was, in fact, not a legal officer. The process was directed to "any sheriff," and could only be executed by a sheriff. The justice of the peace, by whom the attachment was issued, could not have authorized a constable to execute it, because the amount in controversy exceeded the penalty of a constable's bond ; nor could he, in any case, authorize a constable, or any one else, to execute it in another county.—*Gresham v. Leverett*, 10 Ala. 384 ; *Pope v. Stout*, 1 Stewart, 375.

7. The evidence justified the charge of the court ; and the court was authorized to charge on "the effect of the evidence," because requested to do so by one of the parties.

That the charge was against the party who requested it, does not vary the case.

BYRD, J.—[1.] The plea of not guilty, to an action of trover, puts in issue every matter which can be pleaded in bar, except a release. The bill of exceptions shows, that all the evidence introduced on the trial is set out therein. The court charged the jury, “that, if they believed all the evidence, they must find for the plaintiff, for the value of the said cotton on the day of the said demand upon and refusal by said Morris, with interest on that value from the day of said demand, up to the day of rendering their verdict.” The appellee contends, that the court did not err in giving the charge, for the following reasons: 1st, that the contract between Hall and the Bank of Louisiana was void, as being in violation of section 939 of the Code of Alabama, and of a law of the United States (vol. 12, p. 257,) and the proclamations of President Lincoln, (*ib.* 1262-64;) 2d, that it is not shown that the Bank of Louisiana had any authority under its charter to buy cotton, and therefore it acquired no title, nor did Hall part with his, by the sale to the agent of the bank.

The argument of counsel for the appellee is mainly addressed to these points, and to a consideration of those made by appellant's counsel. The latter contend, that the court erred in the charge given, upon the following grounds: 1st, that the sale was valid, and passed the legal title to the cotton, to the bank; 2d, that the appellee, upon the evidence, is estopped from setting up a title in himself, as against the appellant; 3d, that, conceding the contract of sale to be void, and that the bank could assert no title under it, yet, if there was a delivery of possession of the cotton to the bank, and subsequent actual possession of its agents, or of another who acted as an officer of the law, by the assent of appellee, under whom the appellant claims, the former can not maintain this action against the latter; and, 4th, that this action is not maintainable against appellant, who is a mere bailee of the law, and has done no act in violation of his duty as said bailee; in other words, that the evidence does not show that appellant has con-

verted the property. These points are extracted from the arguments of counsel which, at the bar, and on their briefs, were elaborated with much earnestness, learning, and profound research. I do not deem it a duty to pass upon all the points argued by counsel, but will proceed to notice such as are decisive of this cause in this court.

It does not appear to me a matter of any consequence to *this* case, whether the person who endorsed the levy upon the attachment was an officer authorized to do so by law or not, or whether he acted with or without authority of law; and this will be apparent from the further consideration of the questions involved in the charge given by the court below.

The nicety of this case requires at our hands a review of some of the numerous decisions touching this question, viz., when can a general affirmative charge be given or refused by the court, without subjecting its action to a reversal?

In the case of *Pope, adm'r, v. Robinson*, (1 Stew. 415,) only one witness was examined by the plaintiff; and "the court charged the jury, that, if they believed this evidence, in the opinion of the court, it supported the declaration;" and this court held the charge a proper one. The evidence in that case was clear and explicit, and it was not necessary for the jury to infer that another fact existed, in order to find for the plaintiff.

In the case of *Paul v. Meek*, (6 Ala. 753,) both parties introduced evidence. The court charged the jury, that, if they believed the testimony of the defendant, they must find a verdict in his favor; and this court held, that the charge was properly given. It will be seen by reference to the case, that the evidence was positive, and involved no inferential facts.

In the case of *Costillo et al. v. Thompson*, (9 Ala. 937,) the court charged the jury, that, if they believed the evidence, they must find for the plaintiff. It appears from the report of the case, that the defendant only introduced a deed in evidence, and that the plaintiff introduced several deeds, and parol evidence tending to show fraud on the part of the defendant, Costillo. This court held, that "this intent [to commit a fraud] the court could not, of its own mere

motion, determine as matter of law; it was peculiarly a question of fact to be left to the jury."

In *Stewart v. Hood et al.*, (10 Ala. 600,) it appears that both parties examined witnesses, and the plaintiff asked the court to charge the jury, "that, from the evidence in this case, they must find for the plaintiff;" and this court held that the charge was properly refused, for the reason that the evidence "was not so certain and definite in its nature, or the conclusions to be drawn from it, as to warrant the court, as a matter of law, in charging the jury that it made out a case, either for the plaintiff, or for the defendants."

In *Boyd et al. v. McIvor*, (11 Ala. 822,) it will be seen by reference to the report of the case, that the plaintiff alone introduced testimony, and the court charged the jury, "that, if they believe all the evidence, they must find for the plaintiff;" and this court said, "We do not consider it necessary to determine whether such a case as this is one in which the court would compel the defendant to join in a demurrer to evidence, because, conceding it to be such, the court erred in its judgment." This case is in conformity with the rule, that the court can not properly, in every case, compel a plaintiff to join in a demurrer, tendered by the defendant, to the evidence of plaintiff; but, in some cases, it is the duty of the court to submit the case to the jury.

In *Bradford v. Marbury*, (12 Ala. 529,) the court, in speaking of a charge which passed on the fact of an assent by the plaintiff to a certain transaction, said: "Though we are not prepared to say this *must* be considered as an assent, it is possible the jury *might* so consider it;" and, "The objection to the request is, that the evidence bearing on this point is too indefinite and inconclusive to warrant the court in saying that one thing or another was proved by it."

In *McCall v. Doe, ex dem. Pryor*, (17 Ala. 533,) this court held, that when, on the trial of an ejectment, it is shown that one, upon whose mere presumptive title the plaintiff relies, left the possession of the land, the question whether or not he left it *animo revertendi* is for the consideration of

the jury, but the court may decide, whether or not, from the facts of the case, such a question arises.

In the case of *Thomas v. Degraffenreid*, (17 Ala. 602,) this court held, that the court, before which a cause is on trial before a jury, can not pass upon the effect of testimony, when the question to be determined is, whether or not an act was done with a fraudulent intent; and that whether there has been a delivery of a chattel, is not a conclusion of law, but a question of fact to be determined by the jury. See, also, *Lanier v. Br. Bank*, 18 Ala. 625.

In *McClung's Ex'rs v. Spotswood*, (19 Ala. 165,) the court, speaking of the sufficiency of evidence tending to prove an agency, said: "It was for the jury, and not for the court, to determine on the sufficiency of this evidence;" and further, that, "in most cases, where the authority is given by parol, the question whether the agent has exceeded his authority, is a question of fact to be decided by the jury, under the instructions of the court."

In *McKenzie v. Stevens*, (19 Ala. 692,) the court, in speaking of the proof of authority from a father to a son to buy goods, said: "The facts were proven to the jury, from which, according to the authorities above cited, the law presumed an authority from the father to the son to buy the goods, and there was no proof to rebut the presumption. This, we think, authorized the court to charge the jury, that, if they believed the *facts*, they were bound to infer the authority; in other words, they were bound to find for the plaintiff." The distinction established by this and other cases cited seems to be this: where facts are proved, from which the law presumes a certain other fact which is in issue, the court may charge the jury, that they are bound to infer the existence of the fact in issue; and, if that fact is decisive of the cause on trial, in favor of either party, the court may charge the jury, that they are bound to find a verdict in favor of such party, if they believe the evidence from which that fact is inferrible; but, if from evidence the jury may or may not infer the existence of another fact, which is material to the finding of a verdict in favor of one or the other party, and they are not bound to make an inference one way or the other, then it is error for the court

to instruct them that it is their duty to infer the existence of such fact, or to charge them they must find a verdict in favor of either party.

In *McDonnell v. Br. Bank*, (20 Ala. 316,) it appears that the court below charged the jury, "that, if they believed the *proof*, the agency was established." This court said in that case: "However strongly the proof may have tended to establish such inference, still, it is an inference of fact from the other proof, which the jury might very properly draw, but which the court, as matter of law, could not assume."

It is said in several cases, that where there is no conflict in the testimony, the court may, on the request of either party, charge the jury, that, if they believe the evidence, they must find for that party.—*Bryan v. Ware*, 20 Ala. 687; *Stokes v. Jones*, 21 Ala. 731. But, this doctrine must be received, subject to qualifications established in other adjudications. In another case it is said, that if the evidence is clear, and without conflict, and it is only necessary to draw a legal conclusion from it, it is not error to charge the jury, that, if they believe the evidence, they must find for the party whose case is made out.—*Abney v. Pickett*, 21 Ala. 739. If there is a conflict in the evidence, such a charge would be erroneous.—*Knight v. Bell*, 22 Ala. 198; *Woolfork's Adm'r v. Sullivan*, 23 Ala. 548; *Allman v. Gann*, 29 Ala. 240.

In *Saltmarsh v. Bower & Co.*, (22 Ala. 221,) it was held, that whether certain facts amounted to notice to a party, of a transfer of an account, "was a fact to be tried by the jury, and it was for them, and not for the court, to determine whether the evidence established such fact. The charge asked would have been an invasion of the province of the jury." To the same effect is the case of *Pritchett v. Munroe*, 22 Ala. 501. In the latter case, it was held, that a charge is erroneous, which takes away from the jury, and refers to the court, the determination of the question, whether the facts of the case were such as to put the purchaser on his guard, and require him to resort to the ordinary and accessible means of information.

In *Hollingsworth v. Martin*, (23 Ala. 591,) and in some of the cases already cited, it is held, that when the plaintiff

alone offers testimony, a charge that, if the jury believed the evidence, the plaintiff could not recover, is equivalent to a demurrer, and raises the same question. But suppose that both parties introduce evidence, which, though not conflicting, tends to support the claim of the one and the defense of the other, and that the plaintiff or defendant should ask a general affirmative charge; how could the rules applicable to a demurrer to evidence, which is only allowable by one party to the sufficiency of the evidence of the other to support the claim, or to make out the defense, be legally enforced? It must be by making every intendment or inference from the evidence of the party asking such a charge, against him, that could be drawn from all the evidence, or by requiring him to admit every fact that the evidence tends to prove in favor of the adverse party, and against himself; or, at least, every fact which the evidence of the adverse party tends to prove in favor of the latter, and every fact which the evidence of the party asking the charge tends to prove against himself. I admit that I have found it difficult to apply the rules which pertain to a demurrer to evidence, to the case supposed; and I think it would have been better to have only allowed a general affirmative charge, in a case where a demurrer to evidence would have been allowed at common law. But this practice was established by the foregoing decisions, prior to the adoption of the Code of 1853, to the extent as shown in the foregoing adjudications of this court.

The Code, by section 2274, declares, that the court "shall not charge upon the effect of testimony, unless required to do so by one of the parties." This did not enlarge the powers of the court in this respect, but, as we understand, limited or restricted the right of the court to giving such charge when required by one of the parties. Before the Code, the court could give such a charge in certain specified cases, as settled by the decisions of this court, with or without request from either of the parties; and this provision of the Code did not authorize the court to give such a charge, when required by either party, in cases where this court had decided it would be error to give it; but limited the court to giving such as could be properly given,

when required to do so by one of the parties. *It hath this extent—no more.*

We will proceed with the review of the decisions made since the adoption of the Code.

In *Ewing v. Peck*, (26 Ala. 410,) this court, in speaking of a voluntary payment, which was a fact materially affecting the merits of the cause, said: "Now, we will not say that the payment, under these circumstances, may not have been voluntarily made; but, whether it was or not, was a question for the jury, and one which the court could not properly determine,—a question of intent, as being the free act of the party, or as being superinduced by the process or levy."

In the case of *Freeman v. Scurlock*, (27 Ala. 407,) it appears that the court below charged the jury, "that the evidence was not sufficient to make out a conversion of the slaves, against either of the defendants;" and this court said: "This charge can only be supported, in cases where, had the party in whose favor it was given demurred to the evidence, the judge might properly have sustained the demurrer. In such case, as the party demurring is required to admit, as a fact, what the evidence tends reasonably to establish, so that the duty of trying the facts shall not be devolved upon the court, but merely the duty of declaring the law arising upon them, it follows, that if there be any evidence which reasonably tends to show a conversion of the slaves by either of the defendants in the case before us, the charge can not be supported."—*Bryan v. The State*, 26 Ala. 65.

In *Stanley v. Nelson*, (28 Ala. 514,) this court held, that "it is an invasion of the province of the jury, for the court to instruct them, to the prejudice of a party, as to the effect of evidence susceptible of a construction different from that placed upon it by the court."—*Dill v. The State*, 25 Ala. 15.

In the case of *Lawler v. Norris*, (28 Ala. 675,) it was held, that, in order to support a general affirmative charge, in favor of the defendant, "the evidence must be clear, without conflict, and leave nothing to be done except to draw a legal conclusion from the facts." The same rule is

applicable to such a charge given in favor of the plaintiff. But such conflict should be as to some material question in issue.—*Upson v. Raiford*, 29 Ala. 188; *Drake v. Flewellen*, 32 Ala. 106; *Peebles v. Tomlinson*, 33 Ala. 336.

In *Crum v. Williams*, (29 Ala. 446,) the second head-note expresses the opinion of the court as follows: "The court may properly refuse to charge the jury, at the request of either party, that, if they believe the evidence, they must find for him, unless the facts proved, of themselves, independent of any inference which the jury might have drawn from them, entitled him to a verdict." It must be observed, in connection with this case, that this court has held, that when a general affirmative charge is properly asked, it is error for the court to refuse to give it.—*Rhodes v. Otis*, 33 Ala. 578.

In *Gunter v. Lecky*, (30 Ala. 591,) the court below charged the jury, "that, if they believed the aforesaid *state of facts* to be true, they must find a verdict for the defendant." The question, whether the plaintiff had or did not have a license from the probate judge, was material to the determination of the cause, and there was no direct or positive proof one way or the other; and this court said: "Now, although the jury might have been authorized, from the admission made, and from the failure of the plaintiff to produce any license, to infer and find that he had no license; yet it was not a *conclusion of law*, from the facts stated, that he had no license. The court erred, therefore, in not leaving to the jury the question of the existence or non-existence of the license. * * It will not do for the court to overlook the distinction between facts admitted, and the inferences which the jury only are authorized to draw therefrom."—See, also, *Rhodes v. Otis*, 33 Ala. 578.

In *Traun v. Keiffer and Wife*, (31 Ala. 136,) the question of a delivery was involved, and the proof was circumstantial; and the court said: "However weak the proof may have been, the court properly refused to charge the jury, that it was insufficient to establish a delivery. If there was any proof, it was the province of the jury to determine its sufficiency." The charge passed on was one which involved the effect of the testimony.

In *White v. Hass*, (32 Ala. 430,) the court below charged the jury, "that, if they believed the evidence, they must find for the plaintiff, for the amount of said note with interest." No evidence was introduced by the defendant. A question arose, whether an alteration of the note was brought to the knowledge of the defendant. This court said: "We will not say, that the facts proved by the evidence in the present case were not sufficient to justify *the inference by the jury*, that the alteration was brought to the knowledge of the defendant; and that when brought to his knowledge, he assented to it. But the court is not authorized, in such a case, to draw an inference of fact; and without such inference, the facts proved did not warrant the court to declare, as a conclusion of law, that the defendant had assented to the alteration. As this assent is not stated by any witness, nor admitted, the court should have left it to the jury to determine, whether or not he had assented to the alteration; and should have charged them that, if they believed it, they should find for the plaintiff, the amount of the note and interest."

In *Buffington v. Cook*, (35 Ala. 312,) it appears that both parties introduced evidence; the plaintiff documentary evidence, and oral testimony, and the defendant oral testimony only. The testimony of defendant tended to prove the defense set up. The court charged the jury, "that, if they believed the evidence, they must find for the plaintiff;" and this court held, that "the oral testimony did not authorize the charge which the court gave on the effect of the evidence. It certainly can not be affirmed that it establishes, without conflict, the right of the plaintiff to recover."

In *Ward v. The State*, (37 Ala. 158,) the court below charged the jury, that, if they believed the evidence, they must find the defendant guilty. There was only one witness examined on the trial, who made out a strong case against the defendant; and this court said: "We concede, that these circumstances may have been strong, and from them the jury *may* have inferred that the parties had seated themselves to play at cards, and had so far entered upon the game as to deal out hands, and turn up a trump; yet, in order to establish the defendant's guilt, it was necessary

that the jury should infer a further fact or facts than were positively sworn to by the witness. Such further fact, or facts, the law, unassisted by a jury, could not infer." And it was held that the charge invaded the province of the jury. 28 Ala. 700; 33 Ala. 413. There seems to have been no distinction taken or established between a criminal prosecution and civil action, in this respect.

In the case of *The Memphis & Charleston Railroad Co. v. Bibb*, (37 Ala. 699,) it appears that a question of negligence was involved, and the court said: "The testimony in this case tends to show, that the engineer failed to comply with the provisions of the first section of the act of 1858; and to this extent, there does not seem to have been any conflict in the testimony. But there was no witness who testified, or probably could testify, that the accident complained of was occasioned by the engineer's omission of duty. Before it could be affirmed that Mr. Bibb had lost his horses *on account* of the engineer's failure to comply with the duties enjoined on him by the statute, it was necessary that some other fact should be inferred from those of which proof was made. It is the province of the jury to draw inferences of fact; but the court can draw no such conclusions, except the case be within the operation of some legal presumption. The charge given on the effect of the evidence, if believed, invaded the province of the jury."

I think these, and other decisions of this court, may be considered as establishing the following propositions:

1. That a general charge on the *effect* of evidence can not be given, where there is any conflict in the evidence, as to any material point involved in the determination of the cause.

2. That such a charge is erroneous, where any fact, necessary to the decision of the cause, has to be inferred from the evidence, and which is not a legal presumption from it.

3. That when the plaintiff alone introduces testimony, such a charge in favor of the defendant is equivalent to a demurrer to the evidence; or such a charge in favor of the plaintiff, on the evidence of the defendant, has the same effect as a demurrer thereto would have.

4. That where both parties introduce evidence, such a

charge may be given, if there is no conflict in the evidence on any material point, and there is no fact to be inferred by the jury from the evidence, material to the decision of the cause one way or the other.

5. That where both parties introduce evidence, and there is no conflict therein as to a material point, and the facts to be inferred are legal presumptions, the court may give a general affirmative charge; but, in all cases, it must be predicated upon a belief of the evidence by the jury.

6. That where both parties introduce testimony, and it only *tends* to prove the claim of the plaintiff, or the defense of the defendant, it is erroneous to give a general affirmative charge on the effect of the evidence.

7. That the courts should be careful not to invade the province of the jury.

The application of these rules, occasionally, becomes in practice a matter requiring nice discrimination; and in cases of difficulty and doubt, the proper course would be to leave it to the jury to decide, under appropriate instructions from the court, so as to secure to the parties the right of trial by jury; and should the jury make any clear mistake in their verdict, it could be set aside, upon an application for a new trial.

We proceed to the disposition of the questions made in the argument of counsel, keeping in view the principles established in the decisions above cited, so far as applicable.

[2.] We do not think that the contract of sale and purchase, made by appellee and the Bank of Louisiana, is within the prohibition of section 939 of the Code. The purchase of cotton by the bank, with Confederate treasury-notes, is not the exercise of the privilege of banking in this State, within the meaning of that section; and the case of *Wray v. Tuskegee Insurance Company*, (34 Ala. 58,) and the reasoning employed therein, is, in our opinion, decisive of that point. But, in our opinion, such contract was in violation of the laws of the United States, and the proclamations issued by the president in conformity thereto.—See the authorities cited on the brief of counsel for appellee.

[3.] In the case of *The Bank of Augusta v. Earle*, (13 Pe-

ters, 587,) Taney, C. J., in delivering the opinion of the court, said: "It may be safely assumed, that a corporation can make no contracts, and do no acts, either within or without the State which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner, as the charter authorizes. And if the law creating the corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the State, all contracts made by it in other States would be void." To the same effect see *City Council of Montgomery v. M. & W. P. R. R. Co.*, 31 Ala. 76; and *Grand Lodge of Alabama v. Waddell*, 36 Ala. 313. It does not appear from the record that the charter of the bank, if there is one, was introduced in evidence, or its contents proved. It would seem to follow, therefore, that the appellant failed to show that the Bank of Louisiana, if it is a corporation, acquired any title to the cotton by virtue of the contract, even if it were otherwise valid.

[4.] But, though a purchaser obtains possession of property under a contract which in law he is incapable of entering into, or of taking a title to property under it; yet the seller may place himself in such a condition, that he can not sue for and recover the property. If the title passes under a contract, the purchaser is under no necessity to resort to the doctrine of estoppel for his protection, nor is any one claiming under him. The appellant contends, that, although the contract of sale was void, yet, having been fully executed, and the *possession* of the property having passed to the bank or its agents, and the appellee having received the purchase-money, he can not, in a suit to recover the value of the property, set up the invalidity of the contract of sale, to show that his title to the cotton has never been divested; and further, that the appellee is *estopped* from asserting any title to the cotton, as against the appellant, under the evidence set out in the record.

And first, as to the question of delivery: Can a party, who has sold to another *personal* property, and delivered the possession, under a contract in violation of law, or where the purchaser was incapable of making such a con-

tract so as to bind either party, sue for and recover its value in an action of trover. I am clear that, if such contract of sale is illegal, and in violation of law, and both parties stand in *pari delicto*, the seller who has delivered possession under such a contract, and received the purchase-money, can not maintain such an action. Neither can either party, in such a case, maintain an action on the contract. *Black v. Oliver*, 1 Ala. 449; *Rochelle v. Harrison*, 8 Porter, 351; *Windham, use, &c., v. Childress et al.*, 7 Ala. 357; *Boyd v. Barclay*, 1 Ala. 34; *Smith v. Johnson*, 37 Ala. 636; *Givens v. Rogers*, 11 Ala. 543. In the case of *Dodson v. Harris*, (10 Ala. 566,) the purchase-money was not paid.—*Walker v. Gregory*, 36 Ala. 180; *Webb v. Kelly*, 37 Ala. 333. The maxim, "*Cum par delictum est duorum, semper oneratur petitor, et melior habetur possessoris causa*," has a field for operation in such cases as this. *Potior est conditio possidentis*.

And also it seems to me, that such an action can not be maintained against a person, natural or artificial, who has no authority to make, or was incapable of making, such a contract. After a party has received the value of chattels sold and delivered to such a purchaser, he can not be heard in a court of justice to assert the incapacity of the purchaser to make the purchase, as a ground of recovery, and thereby obtain a double satisfaction. Nor can he be allowed to do so against one who holds under such a purchaser. The money so received must be considered as closing his mouth against making such an assertion,—he being competent to contract, and there being no fraud or imposition on the part of the purchaser. A delivery, and the payment of the purchase-money, pass the title.—*Jemison v. Woodruff*, 34 Ala. 143. And this, whether the contract of sale was void or voidable. Such, at least, is the result, as to the parties to the contract, in courts of common law.

The effect of the charge, in the case in hand, was to take from the jury the question, whether there was or was not a delivery of the cotton to the Bank of Louisiana, or its agents. If there was a delivery of the cotton, so as to pass the possession under the contract to the bank, then it would be error to charge them to find for the plaintiff, under the evidence set out.—*Thomas v. Degraffenreid*, 17 Ala.

602; *Nelson v. Iverson*, 19 Ala. 95. And so, too, as to the question of *estoppel* by matter *en pais*. Whether there was such an *estoppel*, is a question for the jury to decide from the evidence in this cause, under instructions as to the law upon that subject by the court.—1 Greenl. Ev. § 209.

We intend to be understood as intimating no opinion upon the sufficiency of the evidence to prove a delivery, or an *estoppel* by matter *en pais*. It is enough to say that there is evidence proving, or tending to prove some, if not all, of the constituents of such a delivery and *estoppel*.—1 Greenl. Ev. §§ 207–209; Long on Sales, 259–275 (148 to 159); *Magee v. Billingsley*, 3 Ala. 679, and cases therein cited.

[5.] In the case of *Kirk v. Morris*, decided at the June term, 1866, we held, that a *stranger*, who replevied property attached, must be held to have done so for the defendant in the suit; and it would seem to follow that, when sued in trover for a conversion of the property, he can make all defenses which the defendant could have made, if he had been sued. Such person holds under the defendant to the suit. Any act which would operate as an *estoppel* against the appellee, in favor of the bank, would therefore seem to be available as a defense for the appellant. Whether any right or lien which the creditor in attachment might set up against the title of a claimant, who had a title superior to the defendant in attachment, but one which is subordinate to the right or lien of such creditor, could be available as a defense to the person replevying, when sued by such claimant, we will not now decide.

[6.] The question whether there was a conversion by appellant of the cotton, *under all the evidence* in this case, which would authorize a verdict against the appellant, was one also for the determination of the jury, under instructions from the court as to the law applicable to the subject.—*Knight's Adm'r v. Vardeman*, 25 Ala. 262.

We do not think that a person who is authorized under the statute to replevy property levied on, and who does so in good faith, under an order of the court having jurisdiction of the subject-matter, without any notice of the claim of the real owner, and who makes no use or disposition of

the property inconsistent with his duty as a bailee thereof under such order, and who holds in subordination thereto, and not otherwise, is, *in legal presumption*, liable in an action of trover to the real owner. It appears that Morris shipped the cotton from the place where it was when he replevied it. But it does not appear whether he did so to convert it to his own use, or for safe-keeping and to secure it for the defendant in attachment, or to have it in condition to be surrendered to the sheriff in case a judgment was rendered for the plaintiff in the attachment suit. If the defendant in the attachment had replevied the property, and had done any act *before* such replevy which amounted to a conversion of the property, it is unnecessary to decide whether he would or would not be liable in an action of trover to the owner, although at the time it was brought he held the property under a replevy bond made in conformity to law. But, if a person, after obtaining possession of property under the law, without any notice or knowledge of the claim or title of the owner, does any act which amounts to a conversion of it, we do not see why, upon principle, the owner could not maintain trover against him. It was for the jury to say, upon all the evidence, whether Morris was guilty of a conversion; and in this respect the court likewise invaded the province of the jury in the charge given. The conversion, which is the *gist* of the action, must be prior to the commencement of the suit.—*Storm v. Livingston*, 6 John. 44.

In support of the views herein expressed upon the point as to what is a conversion, and the proof necessary to establish it, we refer to the case of *Dent et al. v. Chiles' Adm'r*, 5 Stew. & Por. 383, and the authorities therein cited; and we fully recognize the correctness of the principles therein laid down.—See, also, *Murray v. Burling*, 10 John. 172; *Lockwood v. Bull*, 1 Cow. 322; *Robinson v. Burleigh*, 5 N. H. 225; *Houseman v. Stewart*, 23 Ala. 685; *Hartshorn v. Williams*, 31 Ala. 152; Story on Bail. §§ 110, 113, 132; *Weinburg v. Conover*, 4 Wis. 803; *Rogers v. Hine*, 2 Cal. 571; *Munger v. Hess*, 28 Barb. 75; *Davidson v. Donudi*, 2 Smith, (N. Y.) 121.

When there is evidence tending to show a reasonable excuse for the refusal of the defendant to deliver the property, and which is relied on as constituting a conversion, the sufficiency of the excuse is a question for the jury, under proper instructions by the court.—*Connor v. Allen*, 33 Ala. 515; *Watt v. Potter*, 2 Mason's Rep. 77.

In this case, the jury were authorized to look to all the facts in evidence, to determine whether appellant had a reasonable excuse for refusing to deliver when the demand was made. If, under the evidence and the instructions of the court, they should find that there was a delivery of the cotton to the Bank of Louisiana, and that appellee was estopped from claiming the cotton, then there could be no conversion which would give him a right of action. If, on the other hand, the jury should determine that there was no such delivery or estoppel as would affect the rights of appellee, still, it would be their duty to consider all the evidence, and determine whether there had been a conversion of the property by appellant; and whether the appellee had not by his own acts placed the appellant in a condition in which a demand of, and refusal to deliver the cotton, would, of themselves, in connection with all the evidence, amount to a conversion, taking into consideration the reason assigned by appellant for declining to deliver the cotton. The charge given, *in effect*, took these questions from the jury.

There may be other objections to the charge given by the court, than those herein above noticed, but none others have been insisted on in argument; and, as what we have said may be sufficient for the direction of the court below on another trial, we will not say anything more on the correctness of the charge given to the jury, further than, on the questions of delivery, estoppel and conversion, this opinion must be understood as only deciding that the charge was incorrect in assuming the evidence failed to establish the first two and proved the last.

As to the other questions argued by counsel, it is also unnecessary to say anything, as they may not arise on another trial in the same form as presented on this record.

For the error pointed out, the judgment of the city court against appellant must be reversed, and the cause remanded.

AICARDI *vs.* ROBBINS.

[MOTION TO SET ASIDE ENTRY OF SATISFACTION OF JUDGMENT.]

1. *Payment of judgment to clerk.*—The clerk of a court, in which a judgment has been rendered, has statutory authority to receive payment, (Code, § 651; Revised Code, § 771.) and to enter satisfaction thereof; but he can only receive money, such as the plaintiff is bound to accept, and has no authority to receive depreciated paper currency; consequently, the reception by such clerk, in October, 1864, of treasury-notes of the Confederate States and of the State of Alabama, was unauthorized, and did not discharge the judgment. (Overruling *Haynes v. Wheat & Fennell*, 9 Ala. 239.)

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. B. F. SAFFOLD.

THIS was a motion to set aside an entry of satisfaction of a judgment. The judgment was rendered, in said circuit court, on the 19th November, 1862, in favor of George Robbins and Seleta Jackson, against Antonio Aicardi and Samuel M. Hill, for the sum of \$3,502.30 debt, and \$529.37 interest; the action, which was founded on a promissory note, having been commenced on the 8th April, 1861. An execution was issued on this judgment, on the 5th December, 1862, on which the plaintiffs' attorneys made a written endorsement, dated the 22d December, 1862, directing the sheriff to receive, "in payment of said execution, at par, the bills of the banks of this State, and treasury-notes of the Confederate States;" and under this endorsement the sheriff received the notes specified, in payment of the interest, commissions, and costs, and returned the execution, "Stayed by operation of law as to the principal." No other execution was ever issued on the judgment; but, on

the 22d October, 1864, one of the defendants in the judgment paid to the clerk of the court, in treasury-notes of the Confederate States and of the State of Alabama, the full amount due on the judgment; and the clerk thereupon made an entry of satisfaction on his execution docket. The motion to set aside this entry was made on the 23d May, 1866, and was heard at the May term, 1866, before the court, by consent, without the intervention of a jury. On the trial, as the bill of exceptions shows, the plaintiffs offered in evidence the entire record of the cause, including the entries on the execution docket, and then offered the clerk of the court as witness, who testified, in addition to the facts above stated as to the payment of the money due on the judgment, "that he never received any authority from the plaintiffs, or their attorneys, to receive said treasury-notes in payment of said judgment; that no part of the principal or interest due on said judgment was paid otherwise than as above stated; that the only execution ever issued on said judgment was that issued on the 5th December, 1862, on which the interest and costs were paid, as shown by the sheriff's return; that the payment of said interest and costs to the sheriff was made in treasury-notes of the Confederate States; that said treasury-notes, and the treasury-notes of the State of Alabama, were worth in specie, on the 22d October, 1864, only one twenty-fifth of the amount of their face; that he tendered said treasury-notes to the plaintiffs, three or four days after he received them, and said plaintiffs refused to receive them; that said notes were, at the time he received them, so far as he knew, the only currency of the country, and were alone received and paid out as money in the ordinary business transactions of the country; and that he received and paid out such notes in the transaction of his official business as clerk. Said witness stated, on cross examination, that the defendant Aicardi applied to him as clerk, a few days before he received said notes as aforesaid, to take said notes in payment of said judgment, and offered to pay the same thereon; that thereupon, doubting the propriety of his receiving said notes, he wrote to the plaintiffs' attorney, inquiring if he was willing to accept said notes; that he

waited, as he supposed, long enough to receive an answer from said attorney, and, failing to receive an answer, concluded to take said notes, and did take them accordingly, as above stated, in satisfaction of said judgment." It was further proved, on the part of the defendants in the judgment, that on the 22d December, 1862, when said endorsement was made on said execution, said treasury-notes were selling in the market at one-third of their nominal value in specie. This being all the evidence, the court set aside the entry of satisfaction; to which ruling an exception was reserved by the defendants, and which is now assigned as error by them.

ALEX. & JNO. WHITE, for the appellants.—1. The statute gives the clerk authority to receive payment of any judgment in his court.—Code, § 651; Revised Code, § 771. He is thus made the agent of the parties, and holds the same relation to them that a sheriff would occupy who had an execution in his hands.—*Robinson v. Garth*, 6 Ala. 208; *Adams v. McMillan*, 7 Porter, 73. By express statute in this State, the payment of an execution in Confederate money was presumed to be made with the assent of the plaintiff, unless gold or silver, or its equivalent, was previously required in writing.—Acts of 1863, p. 56. The equity of this statute applies to payments made to the clerk of the court, whether before or after the issue of execution. The statutory authority of the clerk is not limited to the receipt of gold and silver: he has a discretionary authority to receive anything which is then passing current in the community as money, although it may not be convertible at pleasure, at its nominal value, into specie.—*Haynes v. Wheat & Fennell*, 9 Ala. 247. That bank-notes, though depreciated, are money within the meaning of this rule, see *Miller v. Race*, 1 Barr, 457; 6 Har. & John. 53; *Scruggs v. Gass*, 8 Yerger, 177; *Bayard v. Shunk*, 1 Watts & S. 95. In October, 1864, State and Confederate treasury-notes were the only currency of this country. They were current in all ordinary business transactions, and their use was sanctioned and fostered by legislative enactment. Gold and silver were then, as they are now, simply a marketable commod-

ity, and not a circulating medium; were quoted in the prices-current, and bought and sold, like any other article which has a marketable value. Indeed, there has never been a time in the history of Alabama, when gold and silver constituted more than a small fractional part of the currency. A payment in Confederate treasury-notes, in October, 1864, stands on the same ground as a payment in United States treasury-notes at the present time: if the latter would be held sufficient, the former must, and for the same reasons. In this case, moreover, the plaintiffs had, by implication at least, authorized the clerk to receive Confederate treasury-notes in payment of their judgment, since they had expressly authorized the sheriff to receive such notes in payment of the interest.

2. The plaintiffs had precluded themselves from setting aside the entry of satisfaction, by their long acquiescence in the payment and receipt of the money. The payment was made in October, 1864; the motion to set aside the entry of satisfaction was not made until after the lapse of eighteen months, when Confederate money had become worthless, and the defendants could not be placed *in statu quo*. The defendants ought certainly to have been notified, within a reasonable time, that the payment was repudiated. For analogous cases, see *Dill v. Camp*, 22 Ala. 258; *Hunt v. Sylk*, 5 East, 449; *Parker v. Palmer*, 4 B. & A. 387; *Burton v. Stewart*, 3 Wendell, 236. If the clerk had been the private agent of the plaintiffs, their ratification of the payment would have been presumed from their long acquiescence; and the same principle ought certainly to be applied in the case of a public officer, who is acting in the discharge of an official duty imposed on him by statute.—*Livermore on Agency*, vol. 1, p. 45; 12 Johns. 300; 1 Johns. Cases, 110; 3 Cowen, 281; 4 Mason, 296; 2 Vesey, 239; 2 Atk. 251.

PETTUS & DAWSON, *contra*.—1. The statutory power of the clerk to receive payment of a judgment is limited to the reception of lawful money, such as the plaintiff would be compelled to accept from the debtor; and if he receives anything else, the plaintiff may, at his option, proceed

either against him, or against the debtor on the judgment. Any other rule would enable the officer to destroy the plaintiff's security for his debt, without his consent, or against it.—*Catlett v. Alexander*, 4 How. (Miss.) 404; *Bank of Orange v. Wakeman*, 1 Cowen, 46; *Munford v. Armstrong*, 4 Cowen, 553; *Wickliffe v. Davis*, 2 J. J. Mar. 69; *Griffin v. Thompson*, 2 How. (U. S.) 244. The case of *Haynes v. Wheat & Fennell*, 9 Ala. 239, is opposed to the current of authority on this point, and ought to be overruled on principle. But even that case does not sanction the payment of paper currency so greatly depreciated as the Confederate treasury-notes are shown to have been in this case.

2. The sheriff was authorized, by the act approved December 8, 1863, to receive Confederate treasury-notes in payment of an execution, unless the plaintiff, by written endorsement on the execution, demanded payment in gold or silver. But there is an obvious distinction between sheriffs and clerks. By placing an execution in the sheriff's hands, the plaintiff actively interferes, and demands his money; but a payment to the clerk is a voluntary act on the part of the defendant, made without the plaintiff's assent, express or implied. The plaintiffs below recognized the validity of the payment to the sheriff, on the execution, because it was authorized by their attorneys; but they never authorized the payment to the clerk, and had a right to repudiate it.

JUDGE, J.—On the 22d of October, 1864, the clerk of the circuit court of Dallas county received from the appellants, in payment of a judgment which had been rendered against them in said court, payment thereof in Confederate States treasury-notes, and notes of the State of Alabama. The latter notes were issued during the late war, and were made redeemable in Confederate States treasury-notes, or five per cent. coupon bonds of the State, at the option of the State. The clerk made an official entry on the execution docket, of the payment of the full amount of the judgment, which contained no statement, or explanation, as to the character of the funds he had re-

ceived in payment. At the spring term, 1866, of the court the plaintiffs in the judgment moved the court to set aside the entry of satisfaction which had been thus entered. The motion was granted, and an execution awarded on the judgment. This action of the court is now assigned for error, and presents the question, Was the judgment satisfied, as against the plaintiffs therein, by the action of the clerk as above stated?

While the clerk of a court, in which a judgment is rendered, has authority, under our statute, to receive payment of it; still, as against the plaintiff, he can receive in such payment *money* only—such money as the plaintiff is bound to accept. What, at the date of the entry of satisfaction in the present case, was such money? The answer is, that by the law, as it then stood, gold or silver coin only was a legal tender in payment of debts; and as the plaintiffs could not have been required to accept anything else in satisfaction of their demand, the clerk was authorized to receive nothing else in such satisfaction, without the consent of the plaintiffs.

We should not deem it necessary to say more in support of this proposition, but for the decision of this court in the case of *Haynes v. Wheat & Fennell*, 9 Ala. 239. The doctrine of that case is, that where bank-notes, whether “convertible at pleasure into specie, for their nominal amount, or not,” are current as money in the ordinary transactions of commerce—excluding the precious metals from general use, and constituting the actual medium of exchange—clerks and sheriffs have the power to receive them in satisfaction of judgments and executions; and that no satisfaction of a judgment or execution, thus effected, can be set aside by the plaintiff, even though effected without his consent.

This case, it is believed, is opposed to the decided current of authority on this question, and is irreconcilable, on principle, with the later decisions of *West, Oliver & Co. v. Ball & Crommelin*, 12 Ala. 340, and *Chapman, Lyon & Noyes v. Cowles*, decided at the June term, 1867. In each of the last mentioned cases, it was decided, in effect, that an attorney-at-law, in virtue of his general powers as such,

has no authority to receive, in payment of a debt placed in his hands for collection, anything else than gold or silver. If a clerk, or sheriff, may receive in satisfaction of a judgment or execution, without the consent of the plaintiff, and bind him thereby, current bank-notes, *because they are money*, it would seem to follow, that the plaintiff should be compelled to receive the same notes, if taken by his attorney, *because they are money*. The true rule in such cases, however, is clearly stated by Goldthwaite, J., in *Holt v. Robinson*, 21 Ala. 106. In that case, the sheriff had taken the promissory note of a third person, in payment of the execution, and returned the execution satisfied, without qualification. This was held to be a satisfaction of the execution, *as to all persons but the plaintiff in the judgment*; that "on his motion, alone, could the return have been set aside; and that as between the sheriff and the defendant in execution, the former was bound to pay the amount according to his return."

The rule thus announced, in *Holt v. Robinson*, is, we repeat, the correct rule, in all cases where the officer receives in satisfaction of the judgment, anything which the plaintiff is not compelled to receive. It secures to the plaintiff the full measure of all his legal rights, protects the defendant, and fixes a just responsibility upon the officer.—See, also, *Reed v. Pruyn & Statts*, 7 John. 425.

We have met with but a single adjudication, which seems at all to sustain the principles of *Haynes v. Wheat & Fennell*, as applied in that case; and that is the case of *Crutchfield v. Robbins, Tingley & Co.*, 15 Humphreys, 15. The ground of decision in the last mentioned case is, that "current convertible bank-paper is money;" which does not go quite so far as *Haynes v. Wheat & Fennell*; though both, in the application made of the principles decided by them, are alike obnoxious to sound reason and authority. As opposed to these two adjudications, the following authorities are cited: *Griffin v. Thompson*, 2 How. (U. S.) 244; *Gwin v. Breedlove*, 2 How. (U. S.) 29; *McFarland v. Gwin*, 4 How. (U. S.) 717; *Callett v. Alexander*, 4 How. (Miss.) 404; *Morton v. Walker*, 7 How. (Miss.) 554; *Anderson v. Carlisle &*

White, ib. 408; *Tuft v. Fulgham*, 5 How. (Miss.) 621; *Planter's Bank v. Scott*, 5 How. (Miss.) 246; *Anketell v. Torrey*, 7 Sm. & Marsh. 467; *Randolph v. Ringgold*, 5 Eng. 279; *Wickliffe v. Davis*, 2 J. J. Marsh. 69; *Trumbull v. Nicholson*, 26 Ill. 49; *Armstrong v. Garrow*, 6 Cow. 465; *Hevener v. Kerr*, South. (N. J.) R. 53; *Coxe v. State Bank*, 3 Hals. 172; *Moody v. Mahurin*, 4 N. H. 296; *Sinclair v. Pierce*, 5 J. J. Marsh. 64. Other citations of authority might be made, but we deem the above sufficient.

We feel constrained to overrule as authority the case of *Haynes v. Wheat & Fennell*.

The judgment of the court below is affirmed.

KIRTLAND vs. MOLTON.

[ACTION ON PROMISSORY NOTES, BY PAYEE AGAINST MAKER.]

1. *Measure of damages.*—In an action on several promissory notes, payable on their face in Confederate currency, in February, April, and June, 1865, the measure of damages is the value of the specified currency at the maturity of the notes respectively.
2. *Ordinance No. 26, adopted 28th September, 1865, as to parol evidence showing consideration of contracts, and measure of damages for breach; construction and validity of.*—The first clause of the third section of ordinance No. 26, adopted by the State convention on the 28th September, 1865, (which provides that, “in all suits upon contracts made between the 1st September, 1861, and the 1st May, 1865, parol evidence shall be admissible to prove what was the consideration thereof, and whether or not the parties thereto understood or agreed that the same should be discharged by a payment in Confederate currency or treasury-notes,”) simply changes a rule of evidence, and is not violative of the constitutional provision against laws impairing the obligation of contracts; but the residue of that section, (which is in these words: “and if so, or if it appears so from the contract, then to show what was the real or true value of the consideration of the said contract, and what amount the plaintiff is legally, justly, and equitably entitled to receive according to the contract, by the judgment of the court,”) so far as it would affect the measure of damages for the breach of an express contract, and make the value of the consideration an element in determin-

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ing the damages for a breach, is violative of the obligation of such contract, and is, therefore, unconstitutional and void. (BYRD, J., *dissenting*, held the entire section of the ordinance nugatory and void, unless it was simply intended to authorize the reformation of contracts at law, without the necessity of resorting to a court of equity; and he doubted whether that was the intention of the framers of the ordinance.)

3. *Validity of contract made within Confederate States during late war, and payable in Confederate currency.*—Held, on the authority of *Scheible v. Bacho*, (*ante*, p. 423.) that a promissory note, executed in Alabama, in December, 1864, and payable on its face in Confederate currency, is not illegal and void, and that an action may be maintained for a failure to pay such note at maturity.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

IN this case, three separate actions were brought by Charles H. Molton, against Sidney Kirtland; all being commenced on the 16th January, 1866, and each being founded on a promissory note. Each of the notes was executed by the defendant, dated the 8th December, 1864, and payable to C. H. Molton or order; one being for seven thousand, four hundred and thirty-three dollars, payable sixty days after date, "in currency, value received, with interest;" one for six thousand dollars, payable four months after date, "in currency C. S., with interest;" and one for six thousand dollars, payable six months after date, "in currency C. S., value received, with interest." At the June term, 1867, the three cases were consolidated, on motion of the defendant; and a trial was had at the ensuing November term, 1867. The record does not show what pleas were filed. On the trial, as appears from the bill of exceptions, the plaintiff offered in evidence the three notes on which the action was founded; and they were admitted by the court, against the defendant's objection, although no United States internal-revenue stamp was affixed to them, nor any excuse shown for the failure to affix such stamp; to which ruling of the court an exception was duly reserved by the defendant.

"The testimony conducted to show," as the bill of exceptions further states, "that the notes were given to be paid in treasury-notes of the Confederate States, or of the State

of Alabama, which latter notes were redeemable on their face in Confederate States treasury-notes; that the commodities purchased were at Confederate prices, and, in many cases, were priced at more than ten-fold their value in good money; that part of the consideration was a lot of hogs, priced in gross at \$1 37½ per pound, when their value in good money was from five to eight cents per pound; and a lot of goats, priced at \$30 per head, when their value in good money was from seventy-five cents, to a dollar and fifty cents per head. There was proof of the value, in good funds, of the articles sold, and of the value in coin and in '*green-backs*,' or United States currency, of Confederate currency at the several times when the three notes matured. When the plaintiff offered proof of the value of the articles sold, the defendant admitted that such proof was legal, to be weighed by the jury in determining whether the notes were to be paid in Confederate money; but [he insisted] that such proof could not be weighed by the jury in determining the measure of the plaintiff's recovery, further than to aid them in determining that the contract was to be paid in Confederate money; and the defendant asked the court to instruct the jury as above, and excepted to the refusal of the court to do so. There was no evidence of the value of any article or commodity, save those which were the consideration of the notes sued on.

"The court charged the jury as follows: 'The law of this case is governed by the third section of the ordinance of the State convention of 1865, which is as follows:' [See the section copied in the opinion of C. J. WALKER.] 'Courts of law do not enforce the performance of contracts, but give damages for the breach; and in the absence of this ordinance, the general rule of damages would have prevailed—to-wit, the money value of the article to be delivered, at the time of the breach. In all contracts to be discharged in Confederate money, falling due towards the close of the war, the damages would have been almost nominal, owing to the depreciation; and if falling due afterwards, none whatever. Further, in the absence of this ordinance, the rule of evidence which makes the writing the sole expositor of the contract, would have pre-

vailed ; and thus written contracts, expressed on their face, in general terms, to be discharged in dollars and cents, but which, in the contemplation of the parties, really meant Confederate currency, would have to be paid in the constitutional currency of the United States. To prevent results so unexpected and unjust, this ordinance was adopted. It makes evidence admissible, in this class of contracts, to prove the value of the consideration ; thus throwing a hitherto foreign element into the admeasurement of damages, and virtually abrogating the general rule. It expressly abrogates, also, the rule of evidence before mentioned, which prohibits the introduction of verbal testimony to vary a written contract ; and testimony is not only admissible to show that the contract was to be discharged in Confederate money, and to prove the value of the consideration, but also to show what amount the plaintiff is legally, justly, and equitably entitled to receive, according to the contract ; thus letting in evidence of every matter, which might, in the remotest degree, tend to explain the transaction. Such evidence is not made admissible, merely to be discarded. It is argued, that the proper measure of damages is the value of the consideration at the time of the contract. The ordinance was adopted, doubtless, after much deliberation ; and if such had been the intent of its framers, it would not have been left to implication. Besides, the effect of this rule would be to disregard entirely the terms of the contract, in fact to annul it, by requiring the promisor to relinquish the benefit of his bargain, and to pay the exact value of what he received ; thus placing the parties *in statu quo*. The convention had no power to do this. The ordinance does not substitute any measure of damages, that I can discover, for the one abrogated ; owing, no doubt, to the difficulty of prescribing any fixed rule, which would not do injustice in a majority of these cases. If you are satisfied that it was understood, or agreed, that the contract should be discharged in Confederate currency, or treasury-notes, you will inquire what was the real or true value of the consideration ; and then, looking at and duly weighing all the facts and circumstances in evidence, you will ascertain by your verdict what

amount the plaintiff is legally, justly, and equitably entitled to receive, according to the contract. In arriving at 'the real or true value of the consideration,' (in the language of the ordinance,) you will not confine yourselves to the standard of gold or silver, but ascertain it by a fair comparison of full values at the time the contract was made. You are not to discard from your consideration the terms of the contract. It was not the object of the ordinance to annul or impair its obligation, but to furnish reparation for its breach, 'legal, just, and equitable;' not according to the general rules of damages and evidence, before referred to, for these, in the anomalous condition of things, would cut like a two-edged sword, in many cases giving exorbitant damages, and in others of the same character, though slightly differing in circumstances, no damages at all; but reparation, graduated by the intelligence and experience of the juries of the country, guided and enlightened by every circumstance which might possibly shed light on the particular transaction.'

"The defendant excepted to this charge, and also excepted separately to that part of it which relates to the measure of damages; and then requested the court, in writing, to give the following charges to the jury: [1.] 'That the value of the property sold is evidence before them, on the question whether the parties agreed, or understood, that the notes were to be paid in Confederate currency; but, if this fact is established, then the value of the property sold cannot be looked to in fixing the measure of the plaintiff's recovery.' [2.] 'That if the jury find, from the evidence, that by the word *currency*, as employed in one of the notes sued on, and the expression *currency C. S.* in the other two, the parties intended and agreed that the notes were to be paid in Confederate treasury-notes, or Alabama State treasury-notes, then the measure of damages is the value of such treasury-notes, in money current by the laws of the United States, at the time the notes severally fell due, with interest upon such value.' [3.] 'That if the jury find, from the evidence, that the demands sued on were, by the terms of the contract, to be paid in the treasury-notes of the (so-called) Confederate States of America, then they

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must find for the defendant.' [4.] 'That a contract for the payment of Confederate money, made at Montgomery, Alabama, on the 8th December, 1864, cannot be recovered upon.' The court refused each of these charges, and the defendant excepted to their refusal."

The several rulings of the court to which, as above stated, exceptions were duly reserved by the defendant, are now assigned as error.

STONE, CLOPTON & CLANTON, for appellant.—1. For the breach of a contract to pay uncurrent money, or to deliver specified articles, the measure of damages is the value of the thing promised to be paid or delivered, at the time of the breach, with interest on that value. This rule has been repeatedly recognized by this court, and it is of universal application.—*Wilson v. Jones*, 8 Ala. 536; *Jolley v. Walker*, 26 Ala. 690. The fact that the article promised to be paid or delivered changes in value between the making of the contract and the breach, makes no difference in the application of the principle. It may quadruple in value, or diminish to nothing, without affecting the principle. In making their contracts, parties exercise their own judgment and discretion, and assume all the risks of appreciation or depreciation in the value of the article bought or sold, or contracted to be paid or delivered at a future day; and it is not in the power of the courts, or of the legislature, to deprive a party of the benefits of his bargain, if honestly and fairly made. The injury actually sustained by the breach of a contract, is the measure of damages for that breach. If the breach consists in the non-payment of Confederate money, or any other article current or uncurrent as money, the value of that money or currency at the time of the breach is the injury actually sustained, and is, consequently, the measure of damages. See, also, *Dutch v. Warren*, cited in 2 Burr. 1011-12; *Valpey v. Oakley*, 16 Queen's Bench, 941.

2. The ordinance (No. 26) adopted by the State convention on the 28th September, 1865, so far as it attempts to substitute a new rule for the admeasurement of damages

in such cases, by making the value of the consideration an element of the damages, is violative of the constitutional provision, State and Federal, against laws impairing the obligation of contracts. The prohibition of the Federal constitution is against the States, and not against their respective legislatures only ; and it applies to the ordinances of a State convention, and to ordinary legislative enactments, with equal force.—*Dodge v. Woolsey*, 18 How. 331.

The ordinance must, therefore, be construed, and its validity must be tested, by the same rules and principles which govern the construction and validity of ordinary statutes. The simple question presented, then, is, whether the measure of damages for the breach of antecedent contracts can be changed by legislation. The "obligation of a contract," within the meaning of the constitutional prohibition, may be defined as consisting in those duties and liabilities which are imposed on the contracting parties, by the law which is in force at the time of the making of the contract, as the legal result of the terms of their contract.—See the phrase defined, in *Sturges v. Crowningshield*, 4 Wheaton, 122 ; *Ogden v. Saunders*, 12 Wheaton, 257 ; *Bronson v. Kinzie*, 2 Howard, (U. S.) 311 ; 2 Parsons on Contracts, ch. 10, § 6, and notes. In the language of WALKER, C. J., in *Ex parte Pollard*, (40 Ala. 77,) "The prohibition of the constitution is as to the impairment of the obligation, which must not be confounded with *destruction*: it may be impaired, and yet not destroyed. * * * The obligation is impaired, when it is made worse ; diminished in quantity, value, excellence, or strength. The objection to a law can never depend on the extent of the change which the law effects in it." Tested by these authorities and principles, it is impossible to resist the conclusion, that the third section of said ordinance does impair the obligation of contracts, and is, therefore, unconstitutional and void. To uphold the ordinance, and to sanction the measure of damages which it attempts to establish, would break down the distinction between express and implied contracts, and would even place different express contracts on the same footing. One purchaser may have promised to pay one thousand, and another one hundred dol-

lars, for articles of the same actual or intrinsic value ; and yet, under the rule established by the ordinance, the measure of damages for a breach would be the same in each case.

3. The argument against the measure of damages which the third section of said ordinance attempts to establish, does not involve the validity of that portion of the third section which relates simply to the admissibility of oral evidence to show the consideration of such contracts. If part of the ordinance be constitutional, and part unconstitutional, and the two parts can be separated from each other without impairing their effect, or garbling their meaning, it is the duty of the courts to let the constitutional clauses stand.—See *Sudler v. Langham*, 34 Ala. Rep. 334, and authorities there cited. That portion of the section which authorizes the admission of oral evidence, to show the consideration of contracts, is plainly separable from the residue of the section, and is not obnoxious to any constitutional objection. It is, however, unnecessary, since it does not in any manner change or affect the general principle of law which would prevail without its aid ; and it is immaterial, therefore, whether that portion of the ordinance be allowed to stand or fall. The word *dollar* is a generic term, having a different meaning in different countries. A dollar in Spain or Mexico has a different value from a dollar in the United States ; and a dollar in the late Confederate States, during the existence of its *de-facto* government, had still another value. If an action were brought in the courts of the United States, on a contract made in Spain or Mexico, and payable on its face in dollars, parol evidence would be admissible, to show the value of a Mexican or Spanish dollar in currency of the United States ; and so, where a contract was made in the Confederate States, and is payable in dollars, parol evidence would be received to show the value of a Confederate dollar in the present currency of the United States. Such evidence is received on the principle of latent ambiguity: the rule being, that parol evidence is always competent to relieve a difficulty, or to solve an ambiguity, which is caused by oral evidence. It is but applying the contract to the subject-matter.

WATTS & TROY, with whom was J. FALKNER, *contra*.—
1. The ordinance of 28th September, 1865, gave the defendant the right to prove by parol evidence, contradicting the legal interpretation and construction of his contract, what was to be paid by understanding or agreement of the parties; and, as compensation for this right granted to the defendant, allowed the plaintiff to prove the value of the consideration, and permitted the jury to allow him this value. If the defendant avails himself of the right thus given to him, he must take it *cum onere*: he must take it in connection with the correlative right of the plaintiff to have a recovery for the actual value of the consideration—of the thing bought and sold. The defendant might have stood on the terms of his contract, and was not compelled to accept or invoke the aid of the ordinance; but, having invoked the aid of the ordinance, and having accepted the benefits conferred by its provisions, he can not complain of the burden with which the benefits are coupled. In this view, the plaintiff's right to recover the value of the thing sold, with interest, "according to the contract," becomes a matter of consent on the part of the defendant. He takes a benefit, coupled with a burden, and can not complain. The maxim applies, *Volenti non fit injuria*.

2. The convention of 1865, by which the ordinance in question was adopted, declared the ordinance of secession, by which Alabama, on the 11th January, 1861, dissolved her relations with the United States, to be null and void; in other words, declared that Alabama had never been out of the Union—that she had been, during the whole war, under the constitution and laws of the United States; that all acts on the part of her citizens, in contravention of the laws and constitution of the United States, (unless they had become *faits accomplis*,) were likewise void; and that all executory contracts, made in aid of the Confederate States, or opposed to the laws or policy of the United States, were equally void, and incapable of enforcement through the legal tribunals of the country. All such contracts, in the view of the convention of 1865, were simply null and void, and imposed no legal obligation on the parties. The law will imply no promise to pay the value of the thing bought

under a void contract, though a recovery might be had under an express promise.—*Dodson v. Harris*, 10 Ala. 566, and authorities there cited. Seeing the injustice which would inevitably result, to one or the other of the contracting parties to subsisting (but unexecuted) contracts, under this view of the law, the convention undertook to provide a remedy. To allow a recovery for three thousand dollars, on a promissory note given for a horse or a mule; or to refuse any recovery on a note for twenty thousand dollars, given for the purchase of land intrinsically worth one or two thousand dollars in good money, was such manifest and shocking injustice, that the convention felt the necessity of providing a remedy; and that remedy is expressed and embodied in the ordinance of September 28th, 1865. It is, to allow a recovery, as on an implied contract, for the actual value of the thing sold and delivered. Thus construed and interpreted, the ordinance is not violative of the obligation of contracts, and is not obnoxious to objection on any other constitutional ground. The constitution of the United States does not prohibit the States from enacting any retrospective or retroactive law, unless such law is *ex-post-facto*, or unless it impairs the obligation of valid, subsisting contracts. These are the only two exceptions or prohibitions engrafted by the constitution on State authority.—*Satterlee v. Mathewson*, 2 Peters, 380, 411; *Watson v. Mercer*, 8 Peters, 88. The ordinance simply creates or declares the relation of debtor and creditor, as on an implied contract, where no valid contract—in other words, no contract at all—previously existed. The case is not distinguishable, in principle, from that of *Satterlee v. Mathewson*, (*supra*), in which the validity of a State law, creating and declaring the relation of landlord and tenant between the parties to a lease, which had been declared void, was sustained. It is a solecism, a contradiction in terms, to say that a law which creates or declares an implied contract, where no contract at all existed, violates or impairs the obligation of any contract.

3. The agreement to receive currency, or Confederate money, in payment of the notes, was for the benefit of the defendant. To entitle him to claim the benefit of that

stipulation, he ought to have pleaded a tender of that currency, and show a compliance on his part, or an offer to comply, with the alternative stipulation.—*Plowman v. Riddle*, 7 Ala. 775; *McRae v. Raser*, 9 Porter, 122; *Armstrong v. Tait*, 8 Ala. 635; *Love v. Simmons*, 10 Ala. 113; *Nesbit v. Pearson*, 33 Ala. 668.

A. J. WALKER, C. J.—This action is founded upon three promissory notes, dated the 8th December, 1864; one payable in February, one in April, and the other in July, 1865. There was proof conducing to show, that it was understood and agreed between the parties that the notes should be discharged by a payment in Confederate currency. The material question presented in the case is, what is the measure of damages for the breach of the contract of payment of the respective notes, a part of which became due before the overthrow of the Confederate government in Alabama, when the Confederate currency was worth something, and a part became due afterwards, when such currency was worthless as money. The question is to be determined in reference to both classes of contracts.

The third section of the ordinance of the convention, adopted the 28th September, 1865, (Revised Code, 59,) is in the following words: "In all suits upon contracts made between the first of September, 1861, and the first of May, 1865, parol evidence shall be admissible, to prove what was the consideration thereof, and whether or not the parties thereto understood, or agreed, that the same should be discharged in Confederate currency, or treasury-notes; and if so, or if it appears so from the contract, then to show what was the real or true value of the consideration of the said contract, and what amount the plaintiff is legally, justly, and equitably entitled to receive, according to the contract, by the judgment of the said court."

In the case of *Tarleton v. Southern Bank*, at the present term, it was contended, that the section of the ordinance above quoted impaired the obligation of written contracts, in authorizing the admission of parol evidence of an agreement or understanding for the discharge of the contract in the specified currency. This court overruled this proposi-

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tion, maintaining the constitutionality of the clause authorizing the admission of such evidence, upon the ground that it merely swept away a rule of evidence, which the policy of the law prescribed, and which prevented the ascertainment of the real and true obligation of the contract through the agency of parol evidence. In that point of view, the clause did not impair the obligation of the contract, but facilitated its ascertainment. The supreme court of North Carolina, in *Woodfin & Patton v. Erwin Sluder*, at its January term, 1867, decided the same question, as this court has done.

The decision in *Tarleton v. The Southern Bank*, *supra*, vindicates the constitutionality of the clause, upon the ground that the stipulation as to the currency in which payment was to be made was really a part of the contract, and that the ordinance only removes a difficulty in the way of proving the fact that it was a part of the contract. The notes, if the jury believe that the understanding or agreement stated in the ordinance is proved, are to be read as if they were promises to pay so many dollars in Confederate currency.

The measure of damages, for a failure to fulfill such a contract on the part of the promisor, is, and has long been, well established in this State; and the rulings of this court upon the subject are in harmony with the decisions generally in the United States.—*Jolley v. Walker*, 26 Ala. 690; *Williams v. Sims*, 22 Ala. 512; *Wilson v. Jones*, 8 Ala. 536; *Young v. Scott*, 5 Ala. 475; *Blair v. Rhodes*, 5 Ala. 648; *Jackson v. Waddell*, 1 Stew. 579; *Robinson v. Noble*, 8 Peters, 181; *Lanier v. Trigg*, 6 Sm. & Mar. 641; *Gordon v. Parker*, 2 ib. 485; *Bonnell v. Co. jington*, 7 How. (Miss.) 322; *Smith v. Dunlap*, 12 Ill. 184; *Hixon v. Hixon*, 7 Humph. 33; *Phelps v. Riley*, 3 Conn. 266; *Anderson v. Ewing*, 3 Litt. 245; *Van Fleet v. Adair*, 1 Blackf. 346. The measure of damages, thus established, is the value of the Confederate currency at the time of payment, when the breach was committed by a failure to pay the stipulated amount of such currency. This was the law at the time when the contracts which are the subject of suit in this case were made.

The value of the consideration, upon which the contract

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was made, is not an element to be considered in the ascertainment of the damages due upon a breach. The standard of their measure is the value of the currency or thing to be paid or delivered. There can be no question that the right to recover damages according to this standard is of the essence of the contract, and is guarded by the prohibition against impairing the obligation of contracts, contained in the constitution of the State of Alabama and of the Confederate States, which were in force in this State when the contract was made, as well as in the constitution of the United States. So, on the other hand, the obligation of the promisor to pay damages according to that exact standard, and according to it alone, is guarded by the same constitutional provision. Any legislation, which would increase or lessen the measure of the recovery for the breach of the contract, impairs its obligation, and must be void.—*McCracken v. Hayward*, 7 Howard, 608; *Grantly's Lessee v. Ewing*, 3 Howard, 707; *Curran v. State of Arkansas*, 15 Howard, 319.

Therefore, if the ordinance of the convention be understood to substitute the value of the consideration, for which the notes were given, for the value of the Confederate money to be paid, it impairs the obligation of the contract. So, also, if it should make the value of the consideration an element to be regarded in ascertaining the extent of damages, it would violate the constitution; for the prohibition of the constitution does not look to the degree of impairment, but is as intolerant of the smallest, as of the greatest infringement of the obligation of a contract.—*Ex parte Pollard*, 40 Ala. 77, opinion of Walker, C. J. And the prohibition applies as well to a State convention, as to a State legislature.—*Dodge v. Woolsey*, 18 Howard, 331.

The third section of the ordinance may be divided into two clauses; the first of which declares, that evidence of what was the consideration, and of the understanding or agreement as to payment in Confederate money, should be admissible; and the latter of which prescribes, that if there appears to have been an understanding or agreement for payment of Confederate currency, the *value* of the consideration, and the amount to which the plaintiff might

be legally, justly, and equitably entitled, could be shown. The first clause, in permitting the ascertainment of the stipulation for payment of Confederate currency, is susceptible of a complete execution, upon legal principles, without the aid of the latter. When, under its authority, proof is admitted of the additional term as to Confederate currency, the established and pre-existing law meets the exigency of the case, and restricts the recovery of the value of the stipulated number of dollars of Confederate currency. It is obvious, therefore, that this (the first) clause can stand, and be enforced, without the latter; and even if the latter be unconstitutional and void, it is susceptible of enforcement by the courts, and should be enforced, according to the principles which are herein before laid down.—*Mobile & Ohio Railroad Company v. State*, 29 Ala. 573. .

The value of the consideration can not influence the measure of recovery, when the promise is to pay a fixed amount of Confederate currency, at a specified time; because the law of the contract, which the constitution protects from impairment, does not permit it. We are required, upon an established principle of interpretation, to strive to find some other operation for the provision as to proof of the value of the consideration, and to avoid, if it can reasonably be done, a construction which places the law in conflict with the constitution. The ordinance of the convention is applicable not merely to written contracts for the payment of a *specified amount* of the Confederate money, but to all contracts to be discharged in such money, whether the amount is specified or not. For example, if services have been rendered, or goods sold, upon a contract to be paid for in Confederate money, without any specification of the amount, the contract would properly be the subject of a *quantum meruit*, or *quantum valebat* count. Under such a count, proof of the value of the consideration would be appropriate and necessary. There are, doubtless, other cases also, in which such proof would be proper and admissible.

The objection may be made, that this view gives no effect to the provision of the ordinance as to proving the value of the consideration, because such evidence would be com-

petent without the aid of the ordinance. To this objection there are two replies: that the courts are bound to know, that legislative provisions are sometimes rather cautionary than necessary, and adopted more from an apprehension of their necessity, than an enlightened legal conviction of it; and that cases may possibly arise, in which the consideration is so stated in a written contract, as to preclude free and unembarrassed investigation by parol evidence as to what the consideration was, and as to its value. We may, therefore, find for the adoption of the provision as to the proof of the consideration and its value a reason in abounding caution, and also in the possible necessity of it in some cases, in order that an inquiry into the consideration might be had, unaffected by the rule which prohibits the varying of a written instrument by parol evidence.

To hold that the convention intended, by the second clause of the section, to set aside the established law applicable to the contract, as to the measure of recovery, and substitute the value of the consideration, would make the clause itself inconsistent. It permits the party to show the value of the consideration, and what amount the plaintiff is entitled to receive "*according to the contract.*" There is an obvious repugnancy in the clause, if it be understood to contemplate a recovery measured by the plaintiff's right "*according to the contract,*" and to contemplate the rejection of the plaintiff's legal right *under the contract*, and the adoption of the value of the consideration in place of it.

The difficulty of finding an office for all the words of the section, consistently with the constitutional restraint upon State legislation, is acknowledged. It is a judicial duty to seek for such a construction; and we think we have suggested one tolerated by the rules of interpretation. Be that, however, as it may, the first clause is entirely free from constitutional objection; and under its operation, without the last, the plaintiff's recovery, in this case, is to be ad-measured by the value of Confederate money at the time when the respective notes fell due. The construction which we have suggested for the last clause, and which harmonizes it with the constitution, avoids any conflict with the

law-appointed measure of the plaintiff's recovery, when the additional stipulation as to Confederate money is proved.

We realize and sympathize with the hardship which must arise in those cases where the maturity of the note was at a time when the Confederate money was of but little value; or was after the surrender of the Confederate armies, when such money was of no value. In the former class of cases, the recovery would be very small; in the latter, it would be restricted to nominal damages. The promisee having contracted for payment in a currency of fluctuating value, subject to the vicissitudes of war and politics, must submit to the depreciation, as he would have received the benefit of any appreciation, had the order of events been reversed. The hardship here is striking in its degree, but the same in kind with that which is of frequent occurrence in trade and commerce. An analogous case would be presented, if a promise were accepted for the payment of cotton, upon a basis of value of thirty cents per pound, and, at the time of payment, its value should be reduced to six or ten cents. Confidence would be destroyed, and trade paralyzed, if the obligation of contracts were made to yield to hardships, incident to the fluctuations of values and currencies. The sanctity of contracts is consistent with true policy, and exacted by the constitution. A party, acting fairly and lawfully, has a right to stand upon his contract; and has a right to the benefit of a good bargain, if superior sagacity, caution, or forecast, has enabled him to make one. If each one of two persons buys, at a fair sale, the same article, at the same time, one agreeing to give double the value, and the other one-half, each must pay according to his contract; and there is no principle of law, which would graduate the liability of either by the value of the thing bought. If the events which occurred after the making of the contracts in this case, have developed a good bargain to the promisor, he is entitled to the benefit of it, and can not be required, for the relief of a hardship, to pay the value of the things bought. Such a requirement would violate the constitution.

The value of the consideration is competent proof, on account of its pertinency to the question, whether the parties understood, or agreed, that payment of Confederate

money should be made. But it was admissible in no other point of view in this case. The measure of damages in this case is fixed by the law, and could not be left to be determined by the jury, according to their sense of equity and justice under all the circumstances.

The decision in *Sheible v. Bacho*, at the present term, settles the point, that the contracts in this case are not illegal and void.

Reversed and remanded.

BYRD, J.—I am inclined to the opinion, that the convention was not clothed with any legislative power, and that the exercise of it in the adoption of the ordinance of the 28th September, 1865, (No. 26,) is unauthorized, and the ordinance void.—Jameson on Constitutional Conventions, 309, 310, *et seq.* The constitution of the State then in force clothed the general assembly and the executive with all legislative powers; and that constitution must be held to be in force until the new one is substituted in its place. And the new one has the same provision, in this respect, as the old one. I do not say that, if the new constitution provided for the validity of such ordinances, they would not be valid; nor that, if they were submitted to a vote of the people, and ratified, they would not be valid. But neither was done by the convention of 1865. Its power was limited to the formation of a State constitution, and no legislative power was conferred on it by any competent authority, nor have its ordinances been ratified by the people. Be this as it may, my brethren hold that the ordinance is valid and constitutional; and to this I yield in my judicial action.

I do not think that the ordinance referred to is constitutional, in so far as it may seek to interpolate a stipulation in contracts which, when they were made, was not by the law of the land a part of the contract. To give it such an interpretation, would be violative of that provision of the national constitution which inhibits a State from impairing the obligation of contracts.

In the case of *Ex parte Pollard*, decided at the June term, 1866, of this court, WALKER, C. J., in delivering an

opinion, in which I concurred as to the portions hereafter cited, said: "The prohibition of the constitution is as to the *impairment* of the obligation. This must not be confounded with destruction; it may be impaired, and yet not destroyed. * * * The obligation is impaired, when it is made worse; diminished in quantity, value, excellence, or strength. The objection to a law can never depend upon the extent of the change which the law effects in it." And again: "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation, or dispensing with any part of its face." And again: "As the legislature cannot directly impair the obligation, *a fortiori* it cannot by indirect means." In the language of Chief-Justice Marshall, "The principle in the contemplation of the framers of the constitution was the inviolability of contracts, and this principle was to be protected in whatever form it might be asserted." And he further quotes from an opinion of Mr. Justice Trimble, approvingly, as follows: "Whether the law professes to apply to the contract itself, to fix a rule of evidence, a rule of interpretation, or to regulate the remedy, it is equally within the true meaning of the constitution, if it in effect impairs the obligations of the contract."

This ordinance, tested by the principles thus laid down in the opinion of the Chief-Justice in the case of *Ex parte Pollard*, is clearly violative of the Federal constitution, if it means to allow the interpolation of a new stipulation in the contract by parol evidence, where by the principles of the common law such a stipulation could not be inserted, except by an application to a court of equity to reform the contract; or if it means to change the contract, by allowing the "true value of the consideration" of the contract to be recoverable, instead of what the parties agreed was the value thereof; or if it means that the value of Confederate money at the time the contract is due and payable is recoverable; or if it means that the creditor can only recover the value of Confederate treasury-notes at the time the contract falls due by its terms, in cases where the con-

tract is not upon its face dischargeable in such notes, or by some agreement which makes it so, and which is, by the principles of the common law, or by the doctrine of courts of equity, binding upon the parties to the contract.

Mr. Justice Judge, in the case of *Ex parte Pollard*, in his opinion holds the same doctrine as Chief-Justice Walker, above quoted ; for in his opinion he says : "The obligation is the law which binds the parties to perform their agreement, according to its essence, nature, construction, and extent." And in speaking of the power of the legislature over the remedy, he says : "That this power is subject only to the restriction, that it cannot be exercised so as to take away all remedy upon the contract, or to impose upon it new burdens and restrictions, which materially impair the value and benefit of the contract." Now, if the legislature allows the contract to be *materially* changed, whether by the instrumentality of evidence which by law is inadmissible, or by any other indirect or direct means, it would effectually "impair the value and benefit of the contract." If the contract, at the time it was made, and when the ordinance was adopted, had a certain and fixed obligation, which bound one party in law to pay a certain amount of money, and the other to receive it, in discharge of the contract, this right is protected by the constitution of the United States, as much in favor of the one party as the other ; and no State action can diminish the amount the payee is entitled to receive, or enlarge the amount the payer is obligated to pay.

An understanding, not expressed in a written contract, is no part of it ; and if parties thereto were to agree that it was to be paid in Confederate treasury-notes, and the agreement was left out of it by the consent of both parties ; or if it was not contained therein, for any reason for which a court of equity would refuse to reform it ; then it would not be a part of the contract, or binding on either party.—*Leslie v. Langham's Executors*, 40 Ala. 521. And to give such an understanding validity, would be directly violating the obligation of the contract, by the interpolation of a new term in it, which diminishes the amount due by its terms at the time of its execution.

In my opinion, the only constitutional operation which can be given to the ordinance, is to allow a party, in a court of law, to prove an agreement that the debt was dischargeable in Confederate currency, where it would be allowable to do so in a court of equity, on a bill to so reform the contract, and to fix thereby the measure of damages. But I doubt whether that was the intention of the convention. For the ordinance, construed by the language contained therein, clearly indicates that the intention of the convention was to make the "true value of the consideration" of the contract, the measure of damages. It was not its intention to make the value of Confederate money at the date of the contract, or at its maturity, the measure of damages. The former intention is clear from the use of the phrases, the "true value of the consideration of the said contract," and "according to the contract." If the convention had meant the value of the Confederate money, it would not have used the words "true value of the consideration." If it had meant the value of Confederate money at the maturity of the contract, it would not have used the words "of said contract," and "according to the contract;" but would have used, in the first instance, the phrase "of said understanding or agreement;" and in the latter, "according to the understanding or agreement." The word *contract*, in both instances, refers to the words "contracts" and "contract," used in the foregoing part of the same section.

It is so clear from the language of the statute, when construed by legal rules of interpretation, that the convention intended by the ordinance to make the "true value of the consideration," and not the value of the thing in which that consideration was dischargeable, the measure of damages, that it is impossible for me to give any other construction to the ordinance. Where two constructions can fairly and legitimately be given to a statute, it is the duty of the court to adopt the one which is constitutional, if one is so and the other not, although the one adopted is not the one which the language would most naturally suggest. But this follows from another rule, which requires the court to give some effect to a statute, if it can be done according to

the rules of law. But those rules do not require a court to adopt an interpretation, which is in direct conflict with the language of the statute and the intention of the legislature, when the language is clear and explicit in expressing an intention which is inconsistent with the constitution. We cannot give effect to a law by a strained construction, when the natural import of the language is clearly repugnant to such a construction. In such a case, the legislative intent must be declared unconstitutional, and the courts cannot supply it with one which is constitutional. If so, then a court could always avoid declaring a law unconstitutional, by casting out a drag-net, and fishing up an intention which would answer the purposes of the occasion. I cannot, according to my views of legal principles, supply an intention, which is not only not expressed, but is clearly negated by the language of the convention; and that, too, when, in my opinion, the supplied intention is as unconstitutional as the one expressed. The ordinance is unconstitutional, in attempting to make a contract, which, upon its face, is payable in Confederate currency, recoverable on the value of its consideration, instead of upon the value of the currency in which it is dischargeable. In my opinion, the third section of ordinance No. 26 is wholly unconstitutional, unless it is allowable under it for a contract to be reformed in a court of law, and a recovery had on it according to law as so reformed.

I would freely, if I could, give an interpretation and enforce it, which would relieve parties from the hardships that may flow from the doctrine which, in my opinion, is established law. But, a contrary doctrine will produce many hardships, and possibly greater than those which will flow from the law as it is laid down in this opinion. Be this as it may, it is my duty to follow the law, whatever may be the consequences. A people make their own laws, and they appoint judges to interpret and enforce them; and when we do this faithfully, we have fulfilled the part assigned us in the great drama of social and political progress and advancement.

The words "understood" and "agreed," connected by the word "or," although they may not have been used as synony-

mous or equivalents by the convention, yet I am satisfied that no understanding between the parties to a contract, which did not amount to an implied or express agreement, could be enforced in a court of law; nor did the convention intend to make a contract for the parties out of an understanding which did not amount to such an agreement.

The word "agreed," as used in the ordinance, is to be taken in the sense of *stipulated*, or stipulating by way of settling differences, or determining a price or mode of payment. It is the consenting of the mind of the parties contracting to certain things to be done, or left undone, by them or some one of them. To suppose or hold that the convention intended to make a contract, or any part of one, out of a *nudum pactum*, would be discreditable to any judicial tribunal; and would be attributing to the convention a degree of mental inanition or moral obliquity highly derogatory to any legislative body.

To hold that the value of Confederate treasury-notes at the maturity of the contract is to be taken as the measure of the damages, leaves no field of operation for that clause of the ordinance which authorizes the parties "to show what was the real and true value of the consideration of the contract, and what amount the plaintiff is legally, justly, and equitably entitled to recover according to the contract, by the judgment of the said court."

In my opinion, the result attained by a majority of the court is in violation of the ordinance, and abhorrent to law and justice.

These views are expressed in this cause, but are to be taken as applicable to all cases now pending in this court involving questions herein noticed; and this will relieve me from dissenting in each case.

NOTE BY REPORTER.—On a subsequent day of the term, in response to an application for a re-hearing, made by the appellee's counsel, the following opinion was delivered:

JUDGE, J.—The counsel for appellee, in their petition for a re-hearing, have fallen into an error, which a majori-

ty of the court deem it proper to correct. The counsel assume the position, that the case comes within the influence of the rule applicable to a note *payable in money*, but with condition that it may be discharged, *at the option of the maker*, by a payment in some article or commodity, *other than money*. A few words may suffice to show the error of this position. If it be shown by *parol evidence*, under the ordinance of September 28th, 1865, that the parties to a contract, at the time of its execution, "understood or agreed that the same *should* be discharged by a payment in Confederate currency, or treasury-notes," such a contract is clearly not one payable in money, with a condition that it may be discharged by a payment either in money, or in Confederate States treasury-notes, at the option of the payor; and the difference between the two cases is so *patent*, that it cannot be made clearer by argument. In the one case, the obligation of the contract, which is protected and required to be enforced by the constitution, as well as authority and the analogies of the law, all constrain us to adopt the conclusion, that the measure of damages, in a suit upon the contract, is the value of the Confederate States treasury-notes, at the time the contract required them to be paid; while in the other case, it has long been the settled law of this State, that, if the payor neglects to avail himself of the *privilege* inserted for his benefit, according to its terms, the contract becomes an absolute promise to pay money.—See *Weaver v. Lapsley*, decided at the present term.

We attained our conclusion, after the most careful study and investigation, and with a full appreciation of all the difficulties and inequalities which might result from it; our view of the constitution and the law leaving us no alternative.

The application for a re-hearing is overruled.

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[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Dower and quarantine of widow having separate estate.*—The provisions of the Code in reference to the right of dower and proceedings for its assignment, from section 1354 to section 1372, both inclusive, apply only to cases in which the wife has no statutory separate estate; and sections 1991 and 1992, which take away or limit the right of dower of a widow who has a separate estate, apply only to statutory separate estates. (WALKER, C. J., *dissenting*.)
2. *Same.*—A widow who has a statutory separate estate, no matter what its value may be, can not claim, as matter of right, an allotment of dower in any part of her husband's lands; nor has she any right to retain the possession of the dwelling-house, &c., which is but a statutory substitute for quarantine at common law. (WALKER, C. J., *dissenting*.)
3. *Receipt of Confederate treasury-notes by administrator, and conversion thereof.*—An administrator, having received Confederate States treasury-notes for the estate, after the passage of the act approved on the 9th November, 1861, (Session Acts, p. 55,) and having subsequently converted such notes to his own use, is chargeable on final settlement of his accounts, not with their nominal value, but with their actual value in lawful currency at the time of such conversion.
4. *Presumption of retainer by administrator, and consequent extinguishment of debt from intestate.*—Where the husband, at his death, was indebted to the wife for moneys belonging to her statutory separate estate; and she administered on his estate, and received, as such administratrix, personal assets more than sufficient to pay her debt, which were susceptible of conversion into money by sale, and which she retained in specie for six or seven years,—*held*, that the payment and extinguishment of the debt would be presumed, and that the administratrix was entitled, on a final settlement of her accounts, to a credit for the amount of the debt.
5. *Investment by administrator in Confederate States bonds.*—*Held*, on the authority of *Dockery v. McDowell*, (40 Ala. 476,) *Watson v. Stone*, (40 Ala. 441,) and *DeJarnette v. DeJarnette* (at the present term,) that the administratrix in this case was properly refused a credit for certificates of deposit in four-per-cent. bonds of the Confederate States, which she had taken in her own name, and which she never reported to the probate court.
6. *Keeping estate together without order of court; liability of administrator for wood sold and used.*—If an administratrix keeps together her intestate's estate, without an order of court, and the distributees elect to

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charge her with the proceeds of the crops raised on the plantation, she can not be charged with the value of the timber cut and used for fuel for herself and the infant distributees, who were her children ; *secus*, as to timber cut and sold.

APPEAL from the Probate Court of Montgomery.

IN the matter of the final settlement of the accounts and vouchers of Mrs. Harriet Glenn, as administratrix of the estate of her deceased husband, Robert J. Glenn ; “on the trial of which final settlement,” as the record states, “the following agreed case and bill of exceptions were made and taken by the parties :”

“It is agreed in this case, that Robert J. Glenn, the intestate, died in this State, on the 4th day of May, 1858 ; that the value of his slaves and other personal property, at the time of his death, was forty-four thousand dollars ; that the value of his real estate, consisting of fourteen hundred acres of land, at that time was twenty-eight thousand dollars ; that said intestate left a widow and three children ; that the widow administered on said estate, on the 22d day of May, 1858, and kept it together without an order of court, cultivating the plantation, until the emancipation of the slaves in the spring of 1865, and accounted each year, in her annual settlements as administratrix, for the proceeds of the crops, without any objection thereto being made ; that the real estate was a plantation in said county of Montgomery, and was connected with the dwelling-house, where said intestate most usually resided before and at the time of his death ; that the widow, at the death of said intestate, had a statutory separate estate in money, of five thousand one hundred and twenty dollars ; that dower was never assigned to her, nor did she ever make application therefor ; and that she now claims neither dower nor a distributive share of the personalty of said estate, admitting that, since the emancipation of the slaves, her statutory separate estate would be equal to her interest in the estate, both as dowress and as distributee. Upon these facts, the widow asked the court to credit her, in her account as administratrix, with the value of the use and occupation of the said plantation, from the death of her

said husband, until the end of the year 1858, and also for each year separately, to the end of the year 1864, and also with interest on that value, from the end of each year, as it became due. The court allowed the credit, from the death of the intestate to the 1st of January next thereafter, with interest from the commencement of that year; to which ruling the heirs excepted. But the court refused to allow any of the credits asked by the administratrix for any one of the remaining years to the 1st January, 1865; to which ruling the administratrix excepted. The court allowed the administratrix, also, a credit for one-third of the annual value of the plantation, from the 1st day of January, 1859, to the 1st day of January, 1865, with interest from the end of each year, upon the amount then becoming due, for use and occupation; to which last ruling, also, the heirs excepted.

“It is agreed, also, that the children of said intestate, whose names are Mary, Leila, and Annie Glenn, are all minors; and that the administratrix, as widow, never filed an application to have dower assigned, and that it never was assigned. It appeared, also, during the further progress of the settlement, that the administratrix, at divers times, used Confederate treasury-notes, belonging to the estate, for her own purposes; and the heirs moved the court to charge her, for the notes thus used, with the amounts stated on their face, as payment, *pro tanto*, of the amount due to her on account of her statutory separate estate. The court refused to do this, but charged her with the value in gold of said Confederate treasury-notes at the time she used them; to which ruling, also, the heirs excepted.

“It further appeared in the evidence, that her statutory separate estate was money which had been used by her husband, the said intestate, and was a debt due to her from his estate, which she now claims, with interest from the time of his death; and that she received, as administratrix, and as assets of his estate, slaves more than sufficient in value to have satisfied her said debt; and that she kept said slaves until their emancipation, without ever petitioning for an order to sell any of them for the payment of said

indebtedness. Upon these facts, the heirs moved to strike out of her account the amount therein claimed by her as a credit, as her statutory separate estate; which the court refused to do, and the heirs thereupon excepted.

"It further appeared, that the administratrix, at various times during her administration, caused wood to be cut from the said plantation, and sold it; and having charged herself, in her account, with the amount of money received for said wood, the said charge was struck out by the court, on motion of her solicitors, on proof that it was timber cut by her from the land; to which ruling, also, the heirs excepted.

"It further appeared, that said administratrix, in the year 1864, had in her hands a large amount of Confederate treasury-notes, which she invested, by and with the advice of her counsel, as the money of the estate, in four-per-cent. certificates of deposit of the Confederate States; that two of said certificates were in her own name, without more, while the third had the word '*adm'rx*' following her name; that the whole amount so invested had been derived by her from the sale of the crops raised on the plantation, from the sale of vegetables raised in a market garden on the place, and from bacon, lard, butter, &c., produced thereon, and from wood cut and sold from the plantation; that the whole amount derived from these various sources, all of which was in treasury-notes of the Confederate States, had been treated by the administratrix as assets of the estate, and had been used by her at divers times, indiscriminately, for estate purposes, so far as was necessary. It could not be determined from which of these various sources the money so used by her had been derived; but it appeared that, previous to the investment, she had received from the wood so cut and sold, at various times, as much money in such treasury-notes as she invested in said certificates; and the said certificates having been claimed by her as a credit, the same were struck out by the court, on motion of the heirs, inasmuch as the charge against her for wood cut and sold had been already struck out, and it did not appear that the certificates had been reported to the probate court, and although the parol testimony of the administratrix showed

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that the investment was intended by her for and on account of the estate; to which ruling the administratrix excepted.

"It appeared that the balance against the administratrix, on the 4th June, 1862, was \$4,103 84; on the 21st of May, 1863, \$5,623 29, being an increase of \$1,519 45 over the former balance; and on the 15th March, 1864, \$16,076 31, being an increase of \$10,453 02 over the last balance. The minor heirs, by their attorneys, moved the court to charge the administratrix with the value in United States paper currency of \$4,103 84 in Confederate States treasury-notes, as of their value in United States currency on the 4th June, 1862; and with \$1,519 45 in Confederate States treasury-notes, as of their value in United States currency on the 21st May, 1863; and with \$10,453 02 in Confederate States treasury-notes, as of their value in United States currency on the 15th March, 1864; which motion the court allowed, and the administratrix excepted.

"It further appeared that the administratrix occupied the dwelling-house on the plantation during a part of each year, and kept it unoccupied during the balance of the time, for her own use, from the 1st day of January, 1859, until the emancipation of the slaves. The heirs moved to charge her with the value of the use and occupation thereof, and the court allowed her to be so charged; to which the administratrix excepted. The heirs moved the court, also, to charge the administratrix with the value of the fire-wood used by her from the plantation, for her own use, at the dwelling-house, during each of the years she kept the estate together and cultivated the plantation, from said 1st January, 1859, until the emancipation of the slaves; which motion the court allowed, and the administratrix excepted."

There are cross appeals and cross assignments of error, by consent, embracing all the rulings of the probate court, to which, as above stated, exceptions were reserved by either party.

ELMORE, KEYES & MORRISSETT, for the administratrix and widow.—1. The widow's right of dower is perfect at the death of her husband, and can not be taken away or affected by

subsequent events, over which she has no control. If she has a separate estate, her dower is diminished *pro tanto*; but the right of dower is not taken away, unless that separate estate exceeds or equals her dower and distributive share of her husband's estate. In this case, the right to dower clearly attached at the death of the husband, when her separate estate was much less than the statute gave without it. Suppose dower had been assigned to her at any time before the emancipation of the slaves, when the relative value of her separate estate and her statutory rights as dowress and distributee was changed; could the subsequent destruction of the entire personalty of the estate, by the emancipation of the slaves, have affected her rights in any manner? could the heirs and distributees have set aside the assignment of dower, or compelled her to refund any part of the amount which she had received?

2. By statute in this State, the widow is entitled to the possession of the dwelling-house, and of the plantation connected with it, until her dower is assigned.—Code, § 1359. The fact that she took no steps to have her dower assigned, is immaterial.—*Oakley v. Oakley*, 30 Ala. 131. This statutory provision was evidently intended as a substitute for quarantine at common law, which it closely resembles; the only differences between the two being, that the statute secures greater benefits to the widow than the common law allowed—1st, in giving her the possession, not only of the principal messuage, but also of the offices, outhouses, &c., and of the plantation connected therewith; and, 2d, in extending the right of possession for an indefinite period, instead of limiting it to forty days. These statutory provisions were evidently founded in the same public policy which the common law evinced in protecting the interests of widows, and were designed to provide a present home and support for them immediately on the death of the husband, which their distress and helpless condition required.—3 Bacon's Abr. 195. The plantation, dwelling-house, &c., are given to the widow, free of rent, in the condition in which they were at the death of the husband. She is made the temporary usufructuary of the property, and occupies the position which the husband

himself, as head of the family, occupied at his death. The only limitation to this right, specified in the statute, is the assignment of dower; but it may, perhaps, also be terminated by a judicial determination of the fact that the right of dower is gone.

3. Our statutes securing to married women their separate estates, free from the debts and liabilities of their husbands, were designed to further their interests, and to confer on them greater benefits and advantages than former laws extended to them. This being the cardinal object of those statutes, they must receive such a construction as will effectuate that intention. Under the operation of these laws, which have now been in operation for a period of nearly twenty years, there are but few married women who have not some separate estate. The widow has no right of election between her separate estate and her statutory rights as dowress and distributee. To deprive her of the right of dower, because she has a statutory separate estate, would work manifest injustice in many cases, and would, in effect, defeat the purposes of the statutes. To hold the right to dower in abeyance in such cases, until the husband's estate is ready for distribution, would be equally injurious to the widow, and would deprive her of the rights which she enjoyed under former statutes, and under the old common law. A construction which will pervert the express object and design of a statute, and defeat the policy on which it was founded, will never be adopted, unless every other reasonable construction fails.

4. The widow was not chargeable with the value of the timber cut and used as fuel at the dwelling-house. Being tenant of the freehold, by virtue of her quarantine, until her dower was assigned, or (at least) until the emancipation of the slaves, she was entitled to estovers.—2 Bla. Com. 35. If she was liable for use and occupation after the emancipation of the slaves, she was entitled to necessary fire-wood on the same principle.

6. Nor could the widow be charged, on settlement of her accounts as administratrix, with the value of the wood cut and sold from the plantation. If that act amounted to technical waste, it would not render her liable for the pro-

ceeds, as assets, but would, at most, only give a right of action to the heirs.—*Clark v. Burnside*, 15 Illinois, 64.

6. Although the administratrix was authorized, by the act approved 9th November, 1861, to receive Confederate money, or treasury-notes, in payment of debts due the estate, she was not required, as a creditor of the estate, to receive them in payment of the debt due to herself. The right of retainer, which the law gives to an executor or administrator, is a substitute for the right of action, which he would have against any third person; and the doctrine of presumed payment and extinguishment is founded on the right of retainer.—*Kimball v. Moody*, 27 Ala. 130. But the administrator will not be held to a presumed retainer, in the absence of positive proof, where he could not be compelled, as creditor, to accept payment of his debt. Nor can the administratrix, in this case, be charged with a presumed retainer, on account of her failure to apply for an order to sell the slaves; for that would, in effect, charge her with a loss which was not caused by any misconduct, or want of good faith on her part, and which could not have been prevented by ordinary prudence and foresight. If the results of the war had realized the anticipations of our people, her conduct would have been commended as wise and prudent.

7. The administratrix ought to have been allowed a credit for the certificates of deposit in Confederate States bonds. The statutes then in force authorized her to make the investment. The record shows that the investment was made with the funds of the estate, and for its benefit; and no question of good faith is involved. The fact that she took the certificates in her own name individually, does not prevent the certificates from being assets of the estate; for, if she had taken them in her name as administratrix, the legal title would have vested in her, just as it did under the certificates actually taken.—*Tompkeis v. Reynolds*, 17 Ala. 116. Her failure to report the investment to the probate court, within the time required by the statute, does not deprive her of the right to the credit.—*Neilson v. Cook*, and other cases lately decided by this court.

RICE, SEMPLE & GOLDTHWAITE, *contra*.—1. The general principle of law, which is said by Lord Cottenham to be “the result of all the best authorities on the subject,” is thus stated by him: “Although losses may be sustained by the conduct of a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, he is not responsible therefor; yet, if that line of duty be not strictly pursued, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive.”—*Clough v. Bond*, 3 My. & Cr. 491, and authorities there cited. See, also, 2 Williams on Executors, 1529, 1535–7, 1547; 2 Bro. Ch. 156; 11 Wendell, 361; *Gerald v. Bunkley*, 17 Ala. 176. This general principle underlies most of the questions presented in this case. Every violation of it, to meet the supposed necessities (or particular circumstances) of each case that arises, only serves to unsettle the law, and to substitute a doubtful and uncertain, for a fixed and certain rule of liability. An administrator accepts the trust voluntarily, and cannot complain of the responsibility which the laws casts upon him.—*Moyle v. Moyle*, 2 Russ. & Myl. 710.

2. It is the duty of an administrator, generally, within a reasonable time after the grant of letters, to convert into money enough of the personal assets to pay the debts and liabilities of the estate, and make distribution.—*Hasbrouck v. Hasbrouck*, 27 N. Y. 185. Under the laws of Alabama, slaves were deemed perishable property.—*Millard's Adm'r's v. Hall*, 24 Ala. 209. They certainly might have been sold under an order of court, for the payment of debts. The failure of the administratrix to apply for an order of sale, for the unreasonable length of time shown by the record, when there were outstanding claims against the estate, renders her liable for the losses resulting from such delay. *Beall v. Darden*, 4 Ired. Eq. 76.

3. The administratrix is liable for the hire of the slaves, at least up to the time when she became liable for her

delay and failure to sell them.—*Martin v. Foster*, 38 Ala. Rep. 688.

4. All the decisions of the probate court, adverse to the heirs and distributees, as shown by the assignments and cross assignments of error, are insisted on.

BYRD, J.—Quarantine, at common law, was the right a widow had to tarry forty days in the principal messuage of her husband.—Scribner on Dower, 14. It is said that this provision was made in consideration of the destitute situation in which the widow is cast by the death of her husband. By statute in this State, a widow may retain possession of the dwelling-house where her husband most usually resided next before his death, with the offices and buildings appurtenant thereto, and the plantation connected therewith, until her dower is assigned, free from the payment of rent.—Code, § 1359. It may be presumed, that this provision was made in lieu of quarantine at common law, and to make it to the interest of the heirs to have dower assigned at an early day. If it is not in lieu of quarantine, it is cumulative.

At common law, the husband was entitled to all the personal property in possession of the wife at the marriage, or which he might reduce to possession during coverture, and also to the rents and profits of her real estate accruing during his life, if the wife survived him; and if she died first, having issue born alive, whether such issue was living or dead at her death, he was entitled by the curtesy to the lands of the wife during his life. But there is a system of statutory enactments in this State, principally embraced in article III, title 5, part 2, of the Code, (p. 380, §§ 1981 to 1997, inclusive,) which materially modifies these common-law rights. The husband is not entitled to the personal property of the wife belonging to her at the marriage, or subsequently acquired, although he reduces it to possession. The law has secured such property to her, free from the debts of her husband, and the right of disposal of it by him, further than the power conferred on him as trustee to control and manage it. If, then, she has a separate estate at her death of her husband, she has a provision made by

law, which she did not have at common law, to relieve her destitute condition. Besides, the statute giving her the dwelling, offices, and plantation attached, until her dower was assigned, was enacted a long time prior to the statutes which secured to her a separate estate. Among the provisions of the latter, are the two following:

“§ 1991. If a married woman, having a separate estate, survive her husband, and such separate estate, exclusive of the rents, income, and profits, and inclusive of the increase of slaves, is equal to, or greater in value than, her dower interest and distributive share in her husband's estate, estimating her dower interest in his lands at seven years' rent of the dower interest, she shall not be entitled to dower in, or distribution of her husband's estate.”

“§ 1992. If her separate estate be less in value than her dower, as ascertained by the rule furnished by the preceding section, so much must be allowed her as, with her separate estate, would be equal to her dower and distributive share in her husband's estate, if she had no separate estate.”

This latter section was, in part, construed in *DuBose v. DuBose*, (38 Ala. 238,) in which it was held, that it must be read as if the words “and her distributive share” were inserted immediately after the words “preceding section.”

These statutory provisions must be construed in connection with other statutes relating to the same subject-matter, and with the principles of the common law germane thereto.

It has been held by this court, that the statutory right of the widow to retain possession of the dwelling-house, &c., “gives her no estate in the lands until her dower is assigned;” and that her quarantine was not subject to sale under execution against her, although she might be in possession of it.—*Weaver v. Crenshaw*, 6 Ala. 873; *Doe, ex dem. v. Webb*, 18 Ala. 810. It has also been held by this court, that the statutory quarantine attaches only to the premises of which she is dowable.—*Slatter v. Meek and Wife*, 35 Ala. 528; *Harrison v. Boyd*, 36 Ala. 204.

If the husband dies in possession of a dwelling-house and plantation, which he had purchased, and only received a bond for titles when the purchase-money was paid, and any

part was unpaid at his death, whether due or not at that time, the widow is neither entitled to dower, nor to quarantine; and this, however small the balance may be which is unpaid; and so, also, although the whole or any part of the purchase-money may not be due, and the possession of the premises may be vested in the husband until all the purchase-money becomes due. It has also been held by this court, that the provisions of the statute regulating the distribution of the statutory separate estate of a married woman, dying intestate, do not apply to a separate estate created by deed prior to the enactment of the statute securing to married women a separate estate, although the marriage took place subsequent thereto, and the husband, in such case, takes nothing by the statute.—*Willis v. Cadenhead*, 28 Ala. 472; *Hardy v. Boaz*, 29 Ala. 168. And further, that the provisions of the Code, respecting the separate estates of married women, do not apply to separate estates created by deed, either before or since the adoption of the Code.—*Cannon v. Turner*, 32 Ala. 483. And, as this court has held, that a separate estate may be created in a married woman by parol, we see no reason for making any distinction between such an estate and one created by deed, or by testament.—*Jennings v. Blocker's Adm'r*, 25 Ala. Rep. 415.

Upon these adjudications we hold, that the "separate estate" mentioned in sections 1991 and 1992 of the Code is a separate estate created by law, and not one by contract or will.

In *Steadman's Adm'r v. Steadman*, at the present term, we held, that the value of the separate estate of the wife, under sections 1991 and 1992 of the Code, must be ascertained at the time of the distribution of the husband's estate, or when it is ready for distribution, and not at the time of his death, according to the provisions of those sections as construed in the opinion in that case. It results, that, where she has a statutory separate estate, her right to be endowed of the husband's lands is in abeyance until that period. It cannot be ascertained, until that event, whether she will be entitled to dower, nor to what extent she will be entitled, if at all. And the facts of this

case, as shown by the record, clearly illustrate this assertion and conclusion.

The statute provides, that if “such separate estate, *exclusive of rents, income, and profits, and inclusive of the increase of slaves*, is equal to, or greater in value than, her dower interest and distributive share in her husband’s estate, estimating her dower interest in his land at seven years’ rent of the dower interest, she shall not be entitled to dower in, or distribution of her husband’s estate.” Now, it seems to us, that this postpones the valuation of her estate to the time of distribution of the husband’s estate, or when it is ready for distribution; otherwise, why did the legislature use the expression, “exclusive of the rents, income, and profits, and inclusive of the increase of slaves?” If the first accrued before the death of the husband, they were given to him; or, in other words, he was not accountable to “the wife, her heirs, or legal representatives,” for them, and they were not subject to the payment of his debts. Hence, that clause of the statute refers to such as accrued between the death of the husband and the distribution of his estate. And as to the latter “—increase of slaves”—why did the statute include them? Such increase, before the husband’s death, were a part of the *corpus* of the separate estate; and it was unnecessary to use the expression, “inclusive of the increase of slaves,” if it applied to increase before the husband’s death. It must, therefore, have been intended to include such increase between the death of the husband and the distribution of his estate. And for a very good reason; for she would get the benefit, on a distribution of his estate, of the increase of his slaves; and so she would of the income and profits of his estate. But the legislature saw that her right to dower would be in abeyance until the distribution, and, very properly, did not require her to account for the rents, income, and profits of her separate estate, from the death of her husband till the distribution, but allowed them to her for her support, in lieu of dower and its consequential fruits—the right of quarantine by the common law, or the statutory substitute.

This view is further enforced by reference to the provisions of section 1992. If her separate estate, valued as re-

quired by the preceding section, should be less than her dower interest in, and distributive share of her husband's estate, why did the legislature provide, that "so much must be allowed her as, with her separate estate, would be equal to her dower and distributive share in her husband's estate, if she had no separate estate." If, under these statutes, she had a separate estate at all, even less than her dower and distributive share, the law does not give her any absolute right to dower. It only gives her a right "to so much as, with her separate estate, would be equal to her dower and distributive share in her husband's estate." "So much must be allowed her"—of what? It does not say of land, or money. If the legislature intended to allow so much dower in his land, as would make up the balance due her, it has furnished the probate court no rule, by which to arrive at the quantity or value of the land to be allowed her as dower. Nor has the mode of allotting such fractional dower been prescribed by the statute.

If the term *allotted* had been used, instead of "allowed," then it would be clear that the legislature intended that she should have the balance due her in land; and on the other hand, the word "*allowed*" is the appropriate one to be used, where an allowance in money is made in lieu of dower, or compensation, as provided in section 1370 of the Code. Where the Code provides that she may take dower in the land, it uses the terms *allot* or *allotment*, as in section 1365, 1366, and 1368.—Dwarris on Statutes, 696.

Without deciding that the widow may not have a right to elect, in a court of equity, to take the balance due her in land, and to apply to that court to ascertain and set it apart to her, not exceeding in any case her dower interest, we are satisfied that the probate court can only allow her so much out of the assets of the estate, as will equalize her separate estate and her "dower interest, as ascertained by the rule furnished" by section 1991 of the Code. The phrase, "so much must be allowed" her, does not, *ex vi termini*, give the widow a right to an assignment of dower in the husband's lands.

We are satisfied, that the provisions of the Code with reference to dower, from section 1354 to section 1372, in-

clusive, apply to the rights of dower of widows who have no statutory separate estate. Any other interpretation of section 1359 would give a widow who had a separate estate, nearly equal to her dower interest and distributive share in her husband's estate, a statutory quarantine equal to what she would be entitled to if she had no estate of any kind; which quarantine might continue for years, and at least for eighteen months; for no dower could be assigned her, until the estate of the husband was, at least, ready for distribution.

The word "dower," as used in section 1359, means dower as defined in section 1354; and is contained in a distinct system of law, though in part relating to the same subject, from that which creates and regulates the statutory separate estates of married women. The legislature never intended to give a widow who had such separate estate, nearly equal to her dower and distributive share in her husband's estate, the right to retain the possession of the premises described in section 1359, until the settlement of the estate of the husband. It would be in derogation of the rights of creditors and heirs; for their hands would be tied, so that they could not have dower assigned, until the final settlement of the estate of the husband, or until it was ready for *final* distribution. For, as before said, section 1359 was adopted for two purposes at least: first, to make provision for the destitute condition of a widow; and secondly, to compel the administrator, or heir, to have dower assigned at an early day. Construing these statutes, relating to the same subject-matter, and with reference to the decisions of this court and the principles of the common law, we come to the conclusion, that a widow, who has a statutory separate estate, is not entitled, as a matter of right, to any part of the land of her husband as dower, to make her statutory separate estate equal to her dower interest and distributive share in his estate.

The law fixes a rule for the valuation in money of her dower interest in her husband's land, as shown by section 1991 of the Code; and it is this value which is brought into the estimate in determining her rights; and this is to

be added to the value of her distributive share in the personal estate of her husband, and from this sum total is to be deducted the value of the separate estate she may own, if less than the amount of her dower interest and distributive share of her husband's estate; and "so much must be allowed her" as, with her separate estate, would be equal to her dower and distributive share, "if she had no separate estate."

The word "*allowed*," in its usual acceptation, *in this connection*, means something substituted by way of compensation for another thing; and to "*allot*" is usually understood as meaning to set apart a portion of a particular thing or things to some person. Words, used in a statute, should be understood in their usual and common acceptation; and technical words should be considered as used in their common-law meaning, or in the sense in which they are used in particular trades or occupations, when employed in contracts by persons engaged in them.—Dwarris on Statutes, 693 to 697; Sedgwick on Statutory and Constitutional Law, 245-6, 261-2.

It is said that, under this doctrine, if the widow had but an insignificant estate, she would not be entitled to the statutory quarantine. But, still she would be entitled, *perhaps*, to have allotted to her, in a court of equity, so much land, not to exceed her dower interest, as would be considered equivalent to the balance due her on the distribution of the estate of her husband, and the rents thereof from the death of her husband, upon a familiar principle of equity jurisprudence. But, however this may be, we are called upon to give a legal construction to the statutory provisions on this subject, and to fix some rule of construction which will govern the courts in the administration of justice. That hardships may result from the view we have taken of the proper construction of the statutes upon this subject, when applied to other cases than the one before us, may be admitted, without assailing the correctness of the rule; for no general rule can be adopted, without being productive of hardship in some case. The Code seems to treat land, owned by a married woman at her marriage, or subsequently acquired, as a part of her separate estate. If

a different rule from the one laid down were adopted, it is easy to conceive of cases in which it would, in practical application, operate unjustly and inequitably.

The policy of the legislature seems to have been, to separate the estates of the parties to the marriage relation; and yet, upon the death of the husband, to protect the wife, as to her share of his estate, substantially, to the extent that the former law did so, and no further. These statutory provisions have made a *radical* innovation upon the rights of the husband and wife, as they existed at common law, in respect to their respective estates, real and personal. If she has a statutory separate estate, equal to her dower interest and distributive share in her husband's estate, then she is certainly not entitled to dower in his lands; and if not, upon the authorities above cited, she is not entitled to the statutory quarantine; and if the value of her separate estate is a little or greatly less than such interest in the husband's estate, she is only entitled to be allowed so much as will make the amount of the value of the separate estate equal to the amount of her dower and distributive share of her husband's estate. If she were entitled to recover the rents for the dwelling-houses, offices, and plantation mentioned in section 1359 of the Code, or to retain the possession of them, it would destroy the equality which the statute intended to maintain, (in creating, protecting, and disposing of the separate estates of married women,) between the parties to the marriage relation, as to their respective estates. For the widow, if entitled to the statutory quarantine, where she has a statutory separate estate, would, if a different rule is to prevail, get the premises mentioned in section 1359, free of rent, until the estate of her husband was ready for distribution, let it be long or short, and would thereby defeat the rights of creditors and heirs, who could not, before that event, assign or allot her dower, it should term out that she were entitled to it. And if only entitled to be endowed in less than the dower interest as fixed by section 1355 of the Code, they could not, nor could the court, ascertain the amount to which she was entitled, so as to make the allot-

ment. It does not appear in this case when the estate was ready for final distribution.

We concede the inherent difficulty which exists, in giving a judicial construction to the statutes relating to this subject, *even* with all aids furnished by the common law. It has been our object to construe them so as to give effect to the legislative intention; and if we have failed in comprehending what that intention was, it is easy for the legislative department to declare what shall hereafter be the rule in such cases. The conclusion to which we have come, is the one which our judgments attain, after a careful examination of the principles of law and their just application to the subject in hand.

The court therefore erred, in allowing the credit for the use and occupation of the plantation, "from the death of the husband, to the 1st January next thereafter"; and did not err in refusing to allow a credit therefor for each year thereafter to the 1st day of January, 1865; but erred in allowing her one-third of the rents thereof from the 1st January, 1859, to January 1st, 1865. The court also erred, in striking from the account the money charged for wood cut and sold from the lands of the intestate. The court did not err, in charging the administratrix with the value of the use and occupation of the dwelling-house on the plantation.

So far Justice Judge and myself concur in opinion; and the Chief Justice concurs *alone* as to the charge of the value of the wood cut and sold from the land. The subsequent part of this opinion is the result of a concurrence of my brethren, from which I dissent in part.

[3.] The separate estate of the administratrix consisted of a debt due her by her deceased husband, the intestate. She used, "at divers times," Confederate treasury-notes belonging to the estate. The distributees moved for a charge against her of the nominal amount of the Confederate money thus used, to the extent of the debt due to her as her separate estate. The administratrix, in accepting the Confederate money, was guilty of no legal impropriety, if it was done after the adoption of the act authorizing it on the 9th November, 1861.—*Watson v. Stone*, 40 Ala. Rep.

451; *Neilson v. Cook*, 40 Ala. 498; *Dockery v. McDowell*, 40 Ala. 476. In appropriating such money to her own use, she was guilty of a conversion, and became chargeable with the value of the notes so converted.—*Harris v. Parker*, at the present term. As a creditor of the estate, she was not bound to accept payment of her debt in such treasury-notes; and neither law nor justice would authorize us to hold her debt extinguished by an equal amount of the depreciated currency, according to the sum called for upon its face. She was legally chargeable with the value, in constitutional currency, of such treasury-notes converted by her. The court, therefore, did not err in its ruling on the motion of the heirs, and in charging her with the value of the Confederate treasury-notes at the time of conversion.

[4.] There was sufficiency of personalty, susceptible of conversion into money by sale, to have satisfied the debt of the intestate due to the administratrix, and belonging to her separate estate. She had ample time, (six or seven years,) within which to make the appropriation of assets to the discharge of her debt. The law therefore raises the presumption that she did so.—*Kimball v. Moody*, 27 Ala. 130. If payment rested upon evidence of the fact that she had really appropriated the assets to the payment of her debt, she would be entitled to a credit for the amount. Why should it be different when such appropriation is legally presumed? It would be the clearest injustice to hold her debt discharged out of the assets, and not allow her the credit necessarily incident to such discharge. The court therefore committed no error, in refusing to strike out the credit for the amount of the separate estate due the administratrix, existing in the form of a debt due to her by the intestate.

[5.] The court did not err, in striking out the certificates taken in the individual name of the administratrix, with which she had credited herself in her account. And this we hold upon the authority of the cases of *Dockery v. McDowell*, (*supra*,) *Watson and Wife v. Stone*, (*supra*,) and *De Jarnette v. De Jarnette*, at the present term.

My general views, which lay at the foundation of the matters of this opinion from which I dissent, may be seen

in the dissenting opinions in the cases of *Dockery v. McDowell*, (*supra*,) and *Scheible v. Bacho*, at the present term.

[6.] As to the charge of fire-wood, used by the administratrix: If on another trial it appears that she used it on the plantation for herself and children, she should not be charged with it, as they elected to take the proceeds of the crops. The court erred in charging her with fire-wood.

It results, that upon the appeal taken by the administratrix from the rulings of the court below assigned by her as error, the decree must be reversed on the point last noticed; and that upon the appeal taken by Mary Glenn, a distributee, from the rulings of the court assigned by her as error, the decree of the court below must be reversed, and the cause remanded for further proceedings in conformity to this opinion.

HOARD vs. HOARD'S ADM'R.

[SALE OF DECEDENT'S LANDS, BY PROBATE COURT, FOR DIVISION.]

1. *Parties to appeal*.—The purchaser of lands, sold under an order of the probate court, for the purpose of making an equitable division among the heirs, is not a necessary party to an appeal sued out by the heirs, to reverse the order of sale and the subsequent order confirming the sale.
2. *Receiving satisfaction of order or decree appealed from*.—An appeal from an order of the probate court for the sale of a decedent's lands for division, and from a subsequent order confirming the sale, will not be dismissed, at the instance of the administrator, because the infant heirs, who are the appellants, have received the proceeds of sale on final distribution of the decedent's estate, and have not offered to make restitution; it being shown that the money was voluntarily paid by the purchaser, and received by the administrator, more than twelve months before it became due by the terms of sale, and that the payment was thus made, in 1863, in Confederate States treasury-notes.
3. *Sufficiency of petition for order of sale, in averring names and ages of infant heirs*.—A petition for the sale of a decedent's lands for the pur-

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pose of making an equitable division among the heirs, which does not state the ages and christian names of the heirs, although it shows that they are infants, and states the name of their guardian, is fatally defective, (Code, § 1868,) and will not support an order of sale; and if these omissions or defects in the petition can be cured, in any case, by the recitals contained in the order of sale, they are not cured by a recital, as in this case, that the names of the infants were *Angeline* and *Mary*, while the depositions on file simply describe them as *Angie* and *Mollie*.

APPEAL from the Probate Court of Sumter.

IN the matter of the estate of Addison Hoard, deceased. The record shows, that letters of administration on the estate of said decedent were granted by said probate court, on the 19th April, 1859, to Preston G. Nash, who gave bond, and entered immediately on the discharge of the duties of the trust; and that on the 9th September, 1862, the said administrator filed a petition in said probate court, asking an order to sell the decedent's lands for the purpose of making an equitable division among the heirs. The petition described the lands, of which the decedent was alleged to have been seized and possessed at the time of his death, and then contained the following averments: "Petitioner further alleges, that the following named persons are the only heirs and distributees of said deceased—to-wit: William Hoard, about fourteen years of age, of whom Dr. Knott, of Greene county, Alabama, is legal guardian; also, ——— Hoard, about ——— years of age, and ——— Hoard, about ——— years of age, of whom C. S. McConnico, of the county of Sumter, State of Alabama, is legal guardian. He further alleges, that a fair, lawful, and equitable division of said lands, among said heirs and distributees, can not be made without a sale of the same." On the day the petition was filed, the court made an order, setting the 22d October for the hearing of the application, and appointing C. S. McConnico as the guardian *ad litem* "of all said minors;" which order recites, that "it appears to the court, from an inspection of said petition, that the only heirs of said deceased are his three children—William Hoard, who is about the age of fourteen years, and resides with his guardian, Dr. Knott, in Greene county, Alabama; and Angeline Hoard and Mary Hoard, who are under the age of

fourteen years, and reside in Sumter county." McConico, as guardian *ad litem*, endorsed on the petition a denial of its allegations, and required proof thereof. The depositions of two witnesses were taken on interrogatories, to prove the averments of the petition; each of whom testified, that the said lands could not "be fairly, beneficially, or equitably divided among the heirs, without a sale;" and that the names of the heirs were, "William, Angie, and Mollie." On the 27th October, 1862, the court granted an order of sale; the order reciting the appearance of the guardian *ad litem* for the infant heirs, (whose names were stated as in the former order,) his denial of the averments of the petition, the proof taken by depositions, &c.; and directed the sale to be made, after due notice by advertisement, &c., "on a credit of one and two years, with interest from the day of sale, and to be secured by notes, with at least two good and sufficient sureties." The sale was made by the administrator, under this order, on the 17th November, 1862, and reported by him to the court on the 26th November; and the court thereupon made an order, on said last named day, confirming the sale. The report of the sale, and the order confirming it, state that Socrates Parker became the purchaser of the lands, at the aggregate price of \$4,000 36, and executed his notes, with two sureties, for the amount of the purchase-money. •

The record shows, also, that, on the 16th of August, 1863, the administrator filed his accounts and vouchers for a final settlement, charging himself therein, as of the 19th August, with the sum of \$4,675 06, "proceeds of sale of land, with interest;" and that the court rendered a decree on final settlement, on the 16th September, 1863, allowing his accounts as stated, and awarding to each of the heirs and distributees their respective portion of the assets in his hands, including the proceeds of the sale of the lands.

On the 13th August, 1866, an appeal was sued out by the three infant heirs, "from each and every order, decree, and judgment of said probate court, in relation to the petition filed by P. G. Nash, as administrator of Addison Hoard, deceased, for the sale of the decedent's lands." The errors assigned by them were—1st, "the final decree

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of the probate court;" 2d, "the order authorizing the administrator to sell the lands;" 3d, "the order confirming the administrator's report of the sale;" and, 4th, "each order and decree in favor of the appellee." The appellee moved to dismiss the appeal, on the grounds stated in the brief of his counsel; and submitted, with his motion, the affidavits of the probate judge and C. S. McConnico; the former of whom stated, that the purchase-money for the land "was collected from Socrates Parker, the purchaser at the sale, and accounted for on final settlement of said estate, and that the heirs, by William Knott and C. S. McConnico, their general guardians, have received the purchase-money, and have never returned, or offered to return it;" while McConnico stated, in his affidavit, that he acted as guardian for two of the minor heirs, and, as such guardian, received from the administrator their respective distributive shares of the estate, in Confederate States treasury-notes, ("the same being part of the purchase-money of said lands,") and that he had never returned, or offered to return the said treasury-notes, either to the administrator or to Parker.

RICE, SEMPLE & GOLDTHWAITE, with whom were COLEMAN & COCKRELL, for the appellants.—1. The petition for the sale of the lands was fatally defective, in not stating the names and ages of the infant heirs.—Code, § 1868; Session Acts, 1853-4, pp. 55-6. This would have been a fatal defect on error or appeal, even under the former statutes; and other substantial errors and irregularities are shown by the record, which are sufficient to set aside and annul the order of sale.—*Cloud v. Barton*, 14 Ala. 346. The proceedings connected with the sale are founded on statutory authority, and the courts have no power to dispense with any of the statutory requisitions.—*Jackson v. Wiseburn*, 5 Wendell, 136; *Caldwell v. Mayor*, 9 Paige, 572; *Boykin v. Rains*, 28 Ala. 340; *Bright v. Boyd*, 1 Story, 486. If any doubt could be entertained, under the decisions of this court construing the former statutes, it must be removed by the peculiar phraseology of the act of 1854, (above cited,) which expressly declares, that "any order of sale, and sale, made

without a compliance with the requisitions of this act, *shall be wholly void*;" and which was manifestly intended to afford greater protection to the rights of helpless infants than former statutes, as judicially construed, extended to them. Plainer language to effectuate that intention cannot well be conceived.

2. The purchaser of the lands, at the sale made by the administrator, is not a necessary party to the appeal. The doctrine of *caveat emptor* applies to such sales, and there is no implied warranty. An express warranty by the administrator might bind him personally, but could not affect the interests of the estate, or of the infant heirs.

3. The right of the infants to prosecute this appeal cannot be taken away, or affected in any manner, by the voluntary payment of the purchase-money long before it became due; nor by the voluntary receipt of that money by the administrator; nor by the voluntary settlement made by the administrator; nor by the receipt of the Confederate treasury-notes by their general guardian. The voluntary payment of a judgment, or the voluntary execution of a decree for money, by the defendant therein, cannot, in any case, deprive the adverse party of the right of appeal. Restitution, or a tender, of a thing which is worthless, is never necessary; and in this case, it must be observed, restitution is not asked. The motion to dismiss the appeal seeks to make the voluntary payment of the purchase-money, and its voluntary receipt by the administrator and guardian, operate an estoppel on the infant heirs, and as a ratification of the unauthorized sale. The rights of infants cannot be thus taken away, or prejudiced. It is the duty of the court, in every case, where the rights of infants are concerned, to exercise its protective jurisdiction in their behalf.—*Clark v. Gilmer*, 28 Ala. 265; *Sanford v. Granger*, 12 Barbour, 392; *Lefevre v. Laraway*, 22 Barbour, 168. "The distributees' receipt of property, bought with the proceeds of an unauthorized sale by the administrator, cannot operate as a ratification of the sale, unless they were of lawful age when they received it, and knew with what funds it had been bought."—*McArthur v. Carrie's Adm'r*, 32 Ala. 76. At most, the heirs have a right of

election between the land and the money; and a court of equity alone can compel an exercise of that right, or adjudicate on the question of election.—*Gerald v. Bunkley*, 17 Ala. 177; *Oliver v. Piatt*, 3 How. (U. S.) 401.

WM. M. BROOKS, *contra*.—1. The appeal ought to be dismissed, because the purchaser at the sale is not made a party. He is a party in interest, (indeed, the party most interested,) and ought to have an opportunity to assert and defend his rights.

2. The appeal ought to be dismissed, for the further reason, that the purchase-money has been fully paid, fully accounted for by the administrator, and received by the appellants; and the parties cannot now be placed *in statu quo*.—*Hall v. Hrabrowski*, 9 Ala. 278; *Bradford v. Bush*, 10 Ala. 274; *Prewitt v. Garner*, 32 Ala. 13; *McCreliss v. Hinkle*, 17 Ala. 459; *Knox v. Steele*, 18 Ala. 815.

3. If the motion to dismiss the appeal should be overruled, then it is submitted that, in the proceedings connected with the sale of the lands, the record shows a substantial compliance with the requisitions of the statute.—*King v. Kent*, 29 Ala. 542. The act of 1854 is no more stringent or imperative than the former statutes, which have been judicially construed by this court.—*Satcher v. Satcher*, at the last term. If the petition be defective in its description of the heirs, its omissions are supplied by the recitals of the decree, and by the proof.

JUDGE, J.—The motion to dismiss the appeal in this case is predicated upon two grounds: 1st, that the purchaser of the land was not made a party on the appeal; and, 2d, that the amount of the purchase-money, for which the lands were sold, has been received, and is still held by the appellants, and that they are thereby precluded from the prosecution of an appeal from the order of sale.

The first ground is, we think, untenable. The appeal not being alone from the order of confirmation of the sale, the purchaser would be an improper party, he having no legitimate connection with other matters involved in the litigation; and this brings us to the consideration of the second ground.

2. By legislative enactment, based upon a constitutional provision, an appeal lies in all cases like the present, in favor of either party, as "*matter of right*."—Constitution of Ala., Art. 6, § 2; Rev. Code, § 3485. The appeal in the present case was regularly taken; all the requisites of the law to make it valid, and to secure the exercise of the constitutional jurisdiction of this court in revising the action of the court below, having been complied with. Can this court, in such a case, lay the heavy hand of prohibition upon the appellants, and abridge, or deny to them, their constitutional right to be heard on appeal? That it may, under certain circumstances, has been settled by the action of our predecessors, and is, therefore, not now an open question in this State.—*Hall v. Hrabrowski*, 9 Ala. 248; *Bradford v. Bush*, 10 Ala. 274; *McCreliss v. Hinkle*, 17 Ala. 459; *Knox v. Steele*, 18 Ala. 815; *Tarleton v. Goldthwaite*, 23 Ala. 346; *Riddle v. Hanna*, 25 Ala. 484; *Garner v. Prewitt*, 32 Ala. 13. It is equally well settled, that the power thus to act is *discretionary*, "and rests upon the authority, vested in all courts, to restrain the action of suitors before them, when their acts are *oppressive*, or *vexatious*." This, in our opinion, is a high power, and should only be exercised in a case clearly authorizing it; and whether it should be exercised, or not, in any case, cannot be determined by any general rule, but must depend upon the particular circumstances of the case, in which its exercise is invoked.

In *Hall v. Hrabrowski*, (the leading case upon the question in this State,) it was held to be both vexatious and oppressive, in the plaintiff below, to prosecute his suit in this court to reverse a judgment, the correctness of which he impliedly affirmed, *by coercing payment from the defendant under it*. And such was the decision in each of the subsequent cases of *Bradford v. Bush*, and *Knox v. Steele*, which involved a similar state of facts.

In the case of *McCreliss v. Hinkle*, the administrator filed his account and vouchers in the orphans' court, for a final settlement. On the day of the settlement, the court ascertained to be in the hands of the administrator, subject to distribution, the sum of thirty-four hundred and eleven

dollars. The administrator then paid to the distributees, respectively, their portions of this sum, and no decree was rendered against him; but he was discharged, and the estate declared to be fully settled. From this decree a writ of error was sued out, and the cause removed into this court. A motion was here made to dismiss the writ, on the ground that the plaintiffs had received payment of the amount ascertained to be due them. DARGAN, C. J., in delivering the opinion of the court, referred to, and fully approved, the decisions in the cases of *Hall v. Hrabrowski*, and *Bradford v. Bush*; and stated that these decisions would not apply to a case in the orphans' or chancery court, "if it plainly appears from the showing or answer of the defendant, that the plaintiff could not recover less than the amount awarded to him by the decree." It must be noted, that there was nothing in the case, beyond what has been stated above, going to show that the plaintiffs could not recover less on another trial than the amount which had been ascertained to be due them on the settlement; and the decision upon the motion was manifestly predicated upon the fact, *that the payment by the administrator was voluntary*; for the learned chief-justice, in closing his opinion upon that part of the case under consideration, said: "In this particular case, however, there is no decree in favor of the plaintiffs in error. The decree shows that, on the day of the final settlement, a sum of money was in the hands of the administrator, which he paid over to the plaintiffs; and the decree was then rendered in his favor, by which he was entirely discharged. This is the same, in effect, as if this amount had been paid to the distributees before the day of final settlement; and then on that day there had been nothing found in his hands due to the plaintiffs. We cannot doubt but that we should hear the errors assigned."

In *Tarleton v. Goldthwaite*, the first head-note expresses correctly the decision of the court upon the question we considering; it is as follows: "In chancery cases, when the decree is voluntarily executed by the parties, and the complainant receives the money decreed to him, he may nevertheless prosecute an appeal." The case of *McCreliss*

v. Hinkle, seems to have been the ruling authority upon which the court made this decision.

In *Riddle v. Hanna*, (25 Ala. 484,) which was a chancery cause, the decree had been "enforced, on the petition of all the appellants who were of full age;" and the power of the court in question was properly exercised, on the authority of previous adjudications applicable to such a state of facts.

Garner v. Prewitt, 32 Ala. 13, was peculiar in its facts, as bearing upon the question involved. The bill was filed for the settlement of partnership accounts, and a decree was rendered settling the principles upon which the account between the parties was to be taken, and prescribing the amounts of the great majority of the items on both sides. Upon taking the account, the register found a balance against one of the complainants, of \$1,681 50, and against the defendant of \$1,718 21. A settlement was then had between the parties, which included a division of the funds and claims in the receiver's hands; and on the settlement, there were inequalities of a few dollars, which were at once adjusted by payments in cash. The parties subjoined to a statement of the settlement a writing, subscribed by each, acknowledging the receipt from the receiver of the notes which had been assigned to the parties respectively, on the settlement, and of the amounts of cash which had been allotted to each. The writing further stated, that each of the parties against whom a balance had been found by the register, as above named, had accounted for the same, and that reciprocal discharges therefor were given. It was held by the court, that this settlement, and the consequent agreements, made "a contract, in which the parties reciprocally received and granted benefits, and executed discharges;" that it was "impossible for the appellant, or the court, to restore the appellees to the same situation in which they stood when they were induced to make the settlement with the appellant, by his treatment of the decree as valid and subsisting;" and that, inasmuch as the adversaries of appellant could not be placed in *statu quo*, and the court could not perceive that no injury would result to them, it would not permit appellant to allege error in the

decree thus acted on. Under the peculiar facts of the case, we have no fault to find with the conclusion attained by the court therein.

It will be perceived, that not one among the various adjudications of this court, above cited, recognizes a *voluntary payment*, merely, as sufficient to bar the right of the party retaining the payment, to prosecute an appeal as to any matter out of which the payment grew.

We now proceed to a statement and consideration of the facts involved in the present motion. The order of sale required, that the lands should be sold on a credit of one and two years, and that the purchase-money should bear interest from the day of sale. The sale was made on the 17th of November, 1862; and consequently, the first installment of the purchase-money became due on the 17th of November, 1863, and the second installment became due on the 17th of November, 1864. The affidavit of the administrator, submitted with the motion, shows that he received the purchase-money from the purchaser, but does not state when he received it; and the affidavit of the guardian of appellants shows, that he received the distributive share of each of the appellants, as ascertained on the final settlement of the estate by the administrator, of which the purchase-money of the lands was a part. The record shows that the final settlement was made on the 16th September, 1863; and that the administrator charged himself, on the settlement, with the full amount of the purchase-money, as having been received by him on the 19th of August, 1863. Thus we ascertain that the purchase-money was paid about three months before the first installment thereof became due, and about fifteen months before the maturity of the second and last installment. What was the cause of this departure from the usual course, in the payment and receipt of the purchase-money? Who, in the contemplation of the parties to the transaction, might be benefitted, and who injured, by thus paying and receiving the whole of the purchase-money, in Confederate States currency, in a lump, so long in advance of its maturity? But we need not speculate as to this matter. The fact exists, that the purchase-money was not only *voluntarily*, but *swiftly* paid.

Under these circumstances, can it be said that these *minor appellants* are guilty of either vexation, or oppression, in the prosecution of their appeal?

It may be contended, that it is unjust to permit the guardian of appellants to hold on to the proceeds of the sale, while appellants are seeking to reverse the order of sale. But, if this be unjust to any of the parties, to the extent of causing them to suffer, who placed them in the position to suffer from the injustice? They were not thus placed by any legal *coercion*, but by their own voluntary acts, which cannot constitute vexation, or oppression, on the part of appellants. In the exercise of a sound discretion, we feel constrained to overrule the motion to dismiss the appeal. The circumstances of the case surely call for the exercise of the discretionary power of the court, in favor of the minor appellants.

3. We next proceed to a consideration of the case on its merits. The statute, under which the application for the order of sale was made, requires that the application should "describe the lands accurately, and give the names of the heirs, or devisees, and their places of residence;" and that it should "also state, if any, and which of such heirs, or devisees, are under the age of twenty-one years, or married women, or of unsound mind."—Code, § 1868. The statute of 1822 (Clay's Digest, 224, § 16) required, in substance, the same statements to be made in such an application, with the exception that it did not require a disclosure therein, as to which of the heirs or devisees, if any, were of "unsound mind."

In *Griffin's Heirs v. Griffin's Executors*, (3 Ala. 623,) which was an adjudication upon the act of 1822, it was held, that the explicit declarations of the statute, as to what must be stated in the application, were to be regarded as imperative; "that the jurisdiction of the orphans' court, in such a case, being founded upon a statute, it was essential to the regularity of its proceedings, that the requirements of the statute should be adhered to; and it was therefore held, that a petition which did not state the ages of the several heirs, and whether the females were *femes covert*, was bad on demurrer. In the subsequent case of *Cloud and Wife v.*

Barton, (14 Ala. 347,) a similar omission in the application was adjudged insufficient, *on error*, to sustain the decree of sale. See, also, *Blann v. Grant*, 6 Ala. 110.

These judicial constructions of the act of 1822 apply with equal force, in the construction of section 1868 of the Code.—See *Tillinghast v. Jones*, January term, 1867.

The application by the administrator, in the present case, as to a description of the heirs and distributees, is as follows: "He further alleges, that the following named persons are the only heirs and distributees of said deceased, to-wit: William Hoard, about fourteen years of age, of whom Dr. Knott, of Greene county, Alabama, is legal guardian; also,—Hoard, about — years of age, and — Hoard, about — years of age, of whom C. S. McConnico, of the county of Sumter, State of Alabama, is legal guardian." Comment is unnecessary to show the manifest failure of the administrator to comply with the indispensable requisites of the statute, under which the proceeding was had, as to a description of the heirs and distributees. And this defect was not, even if it could have been, cured by the subsequent proceedings. The evidence taken to show the necessity of the sale, gives the names of the two heirs, whose christian names are not stated in the application, as "Angie" and "Mollie," while the decree of sale states their names to be "Angeline," and "Mary."

Other questions are presented as to the regularity of the proceedings in the court below, which we deem it unnecessary to consider.

The decree of sale is reversed, and the cause remanded.

A. J. WALKER, C. J.—I agree that the appeal in this case should not be dismissed. I think there is no inconsistency between the prosecution of the appeal from the decree for the sale of the land, and the retention of the purchase-money. The reason why there is no such inconsistency is, that a reversal of the decree of sale can not affect the title of the purchaser. If the decree of sale is reversed on the ground of a want of jurisdiction, the purchaser had no title to be affected, and he might be ejected

by action, as well in the absence of reversal, as after its accomplishment. If the decree of sale is reversed on the ground of irregularity not affecting the jurisdiction, then the reversal does not impair or divest the purchaser's title. *Wyman v. Campbell*, 6 Porter, 219; *Perkins v. Winter*, 7 Ala. 855; *Evans v. Matthews*, 8 Ala. 99.

If I could proceed on the postulate, that the reversal would affect the purchaser's title, I should hold, that a prosecution of the appeal should not be allowed, without restitution of the purchase-money. The principle upon which appellate tribunals refuse to entertain appeals, unless restitution is made, is strictly analogous to the chancery doctrine, that a party seeking equity must do equity. A party having received money, the retention of which is inconsistent with the reversal of the judgment or decree by virtue of which it was received, can not, standing in that condition, prosecute an appeal. It is inequitable for a party to reverse a judgment or decree while he retains that which he has received by virtue of such judgment or decree, and to which he is not entitled in the absence thereof. Upon what principle of justice, could one receive and retain the purchase-money of land, sold under a decree, and, while so retaining, reverse the decree, if the reversal divested the title; thus retaining the money, upon the ground that there has been a sale, and regaining the land, upon the ground that the sale is avoided? I regard the authorities as conclusive, that such a thing could not be done. The authorities are the same which are collected in *Prewitt v. Garner*, 32 Ala. 13, 23.—See *Morgan v. Ladd*, 2 Gilman, (Ill.) 414; *Thomas v. Negus*, *ib.* 700; *Atkinson v. Manks*, 1 Cowen, 692; *Camden v. Edie*, 1 H. Blacks. 21; *Hargraves v. Lewis*, 7 Ga. 110; *Emerick v. Armstrong*, 1 Ohio, 233; *Claves v. Dickinson*, 8 Cowen, 328; *Carter v. Clark*, 3 Edw. Ch. 495; *Cannon v. Hemphill*, 7 Texas, 184.

The doctrine that an appeal can not be prosecuted without restitution, does not involve the idea of a waiver, or of a denial of appeal. It says, you can not equitably sustain an appeal, unless you make restitution. It does not say, you have waived an appeal, nor that an appeal is denied. It simply says justice and right require the performance of

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a precedent condition, and, until that condition is complied with, an appeal can not be prosecuted. As persons not *sui juris* are required to do equity before they can obtain relief in chancery, so may they be required to perform an equitable condition precedent to a reversal in their favor. I think the decisions fully sustain this view.—*McLeod v. Johnson*, 28 Miss. R. 374; *Kemp v. Pentard*, 32 Miss. 324; *DesLondes v. City of N. O.*, 14 La. An. 552.

What is said in our decisions, as to the prosecution of an appeal by one retaining money paid to him "voluntarily," is not opposed (in my judgment) to my position. The principle of these decisions is, that when part of a money demand is voluntarily paid, it is a legitimate inference that so much was due; and there is no inconsistency between a retention of what is thus acknowledged to be due, and the prosecution of an appeal to obtain the balance claimed. Here, there would be an inconsistency between the reversal of the order of sale and the retention of the purchase-money, no matter whether it was paid voluntarily or coercively, if the reversal would defeat the title.

This court speaks of its power to require restitution before it will hear an appeal as "discretionary." Of course, the court meant a discretion governed by legal principles in furtherance of justice, and not a capricious discretion.

If the infants were prejudiced by the unauthorized or careless reception of the purchase-money by the administrator or guardian, the remedy would be against the tortious trustee, and not by taking the land from the purchaser and retaining in the hands of the guardian the purchase-money.

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[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Sale of perishable property; sufficiency of petition.*—Under the statute authorizing the probate court to order a sale of personal property belonging to a decedent's estate, when "liable to waste, or of a perishable nature," [Session Acts, 1853-4, p. 45; Revised Code, § 2067,] it is not essential to the validity of the sale, when collaterally assailed, that the administrator's petition should allege that the sale "would be beneficial to the interests of the estate," though that fact is required to be proved.
2. *Same; same.*—An averment in the petition, in such case, that the property "is of a character liable to waste, or be consumed by fire," is a substantial compliance with the requisitions of the statute, and is sufficient to sustain the jurisdiction of the court to order the sale.
3. *Private sale by administrator, under order of probate court.*—*Semble*, that under the provisions of the Code, a private sale of property by an administrator is unauthorized, except in the particular cases specially provided for. But, when the jurisdiction of the probate court to order the sale has attached, by the filing of a petition containing the essential averments, the order of sale is not void, because it directs the sale to be made privately, as asked in the petition; nor is the sale, made in obedience to such order, void.
4. *Validity of such sale, as affected by administrator becoming purchaser.*—The fact that an administrator has a secret interest in the purchase of cotton, sold by him under an order of the probate court which is not void, while it may furnish a reason for setting aside the sale on a direct application, does not render it absolutely void.
5. *Same, as affected by allowance of credit, instead of requiring cash.*—The fact that the administrator, in such case, takes from the purchaser a note, with sureties, (instead of requiring cash, according to the terms of the order of sale,) which note is made payable to the mother and guardian of the infant distributees, by and with her approbation, and is received by her as cash, does not render the sale void.
6. *Same, as affected by interests of estate, and conduct of administrator personally.*—The validity of the sale, in such case, is not affected by the fact that, viewed in the light of subsequent events, it does not now appear to have been beneficial to the interests of the estate; nor by the fact that, at the time he applied for the order and sold the cotton under it, the administrator was buying cotton for himself; nor does that fact prove bad faith on the part of the administrator in asking the order.
7. *Liability of administrator for willful conversion, and loss by negligence.* For an intentional conversion of the assets of the estate, an administrator may be charged on final settlement, as a tortfeasor, with their highest value; but, for a loss by negligence merely, he is only charge-

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able with the value of the goods at the time of their loss, and interest thereon.

8. *Sale of decedent's stock of goods by administrator.*—To authorize the sale of a decedent's stock of goods under the provisions of the act of February 5, 1858, (Revised Code, § 2074,) it must be affirmatively shown that he "was engaged in mercantile business in this State;" and where neither the petition nor the recitals of the court show this fact, the order of sale is void, and the administrator is chargeable as for a conversion of the goods.
9. *Receipt of Confederate treasury-notes by administrator.*—*Held*, on the authority of *Watson and Wife v. Stone*, (40 Ala. 451,) and subsequent decisions of this court, that under the provisions of the act approved 9th November, 1861, (Session Acts, p. 53,) an administrator was authorized to receive Confederate States treasury-notes in payment of debts due the estate, and for property sold under orders of the court; and that he was entitled to a credit, on final settlement, for the amount of such notes remaining in his hands. (BYRD, J., *dissenting*.)
10. *Allowance of counsel fees to administrator.*—An administrator is entitled to an allowance, on final settlement, for reasonable counsel fees paid by him, for services rendered, except in the maintenance of improper contests with the distributees.
11. *Compensation of administrator.*—Only willful default, or gross negligence, resulting in loss to the estate, (neither of which is shown in this case,) will deprive an administrator of the right to commissions as fixed by law.
12. *Liability of administrator for negligence.*—An administrator should be charged, on final settlement, "in every case in which the estate has been injured, or a debt has been lost, by his failure to sue upon the same within a reasonable time."
13. *Same.*—Where the administrator and his intestate were both stockholders in an insurance company, which was dissolved by resolution, after the death of the intestate, and the assets distributed among the stockholders, the administrator is not chargeable with the assets received by him on such division, unless it is shown that they were delivered to him in satisfaction of his intestate's interest; but he would be chargeable with any loss to the estate, resulting from his failure to prosecute his intestate's right to a share of the assets.
14. *Liability for unauthorized payment.*—*Held*, that the administrator in this case was not entitled to a credit for money which he had collected from the maker of a note held by the intestate, and which he afterwards refunded, on proof that the debtor had once handed the money to a clerk in the intestate's store, with instructions to have it credited on the note, and that the credit never was entered; there being no proof of the clerk's authority to receive the money, and he being solvent.

APPEAL from the Probate Court of Sumter.

In the matter of the final settlement of the accounts and vouchers of Socrates Parker, as administrator of the

estate of Henry H. Harris, deceased. The intestate died in said county of Sumter, where he resided, on the 1st September, 1862; being possessed of a large estate, which consisted of lands, slaves, money on hand, in gold, silver, and bank-notes, more than two hundred and fifty bales of cotton, a great number of outstanding notes and accounts, and a stock of goods, wares, and merchandise; and leaving his widow, Mrs. Mary S. Harris, and seven infant children, as his heirs-at-law and distributees. Letters of administration on the estate of said decedent were granted by the probate court of said county, on the 13th October, 1862, to said Socrates Parker, who returned a partial inventory of the personal assets on the 9th November, 1862; including therein four thousand dollars in gold and silver, about seven thousand dollars in Confederate treasury-notes, and fourteen thousand in notes of various banks in Alabama, Georgia, and South Carolina. On the 17th November, 1862, the administrator reported the estate solvent, and asked an order for the partial distribution of the money on hand; and the gold, silver, and bank-notes were thereupon distributed under an order of the court. The slaves also, twenty-three in number, were distributed under a subsequent order. On the final settlement of the administrator's accounts, which was commenced on the 28th August, and concluded on the 8th October, 1866, numerous objections were made on the part of the distributees to most of the items in the account as stated by him, and numerous exceptions were reserved by them to the rulings of the probate court in relation to these matters. The great length of the bill of exceptions, which extends through one hundred and seventy-five pages of the transcript, renders it impracticable to state at length the evidence relating to all these matters; nor is such a statement necessary to a correct understanding of the legal points decided by this court. The material facts of the case, briefly stated, are these:—

On the 13th October, 1862, (the day of his appointment,) the administrator filed a petition in said probate court, asking an order to sell the stock of goods. The petition stated the appointment of the administrator, and then proceeded as follows: "In an examination of the

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assets of said estate, your petitioner finds a stock of goods, wares, and merchandise, consisting of ready-made clothing, silks, hats, gloves," &c.; "an inventory and appraisement of which will be returned to your honorable court in a reasonable time. Your petitioner supposes that, at a fair valuation, the same will amount to five or ten thousand dollars. Inasmuch as the articles consist of various kinds, and are much needed by the community, particularly at this time, and many of them in small quantities, your petitioner avers, that it will be greatly to the interest of the estate that the same be sold at private sale. Wherefore he prays your honor to take cognizance of the subject-matter of this petition, and make such order, and prescribe such terms and conditions of the sale as may seem to the court most proper and advantageous to those interested in the estate. Your petitioner would respectfully suggest, that, inasmuch as many of said articles will have to be sold in small quantities, to suit purchasers, it would be best to sell the same for cash."

The court made an order, on the same day, in these words: "This day came Socrates Parker, administrator of the estate of Henry H. Harris, deceased, and filed his application in writing, under oath, for an order authorizing him to sell the goods, wares, and merchandise belonging to said estate, at private sale, for cash. And the court being satisfied that it will be to the interest of said estate that the goods, wares, and merchandise be sold, in the manner, and on the terms desired in said petition, it is therefore considered and ordered by the court, that said petition be granted, and that said administrator is hereby authorized and empowered to sell the goods, wares, and merchandise belonging to said estate, at private sale, for cash; provided that said administrator shall not be allowed to continue said sale as aforesaid beyond the 1st day of March next; and it is further ordered, that said administrator make report to this court of all sales made under this order, in the manner provided by law for making returns of sales of other personal property by an executor or administrator."

The administrator proceeded to sell the stock of goods,

under this order, up to the 1st March, 1863 ; and returned to the court, on the 21st January, 1864, an account of his sales, amounting in the aggregate to \$5,531 90. On the 21st January, 1863, however, the administrator filed another petition in the probate court, representing that a portion of the goods would remain on hand, unsold, at the expiration of the period limited by the former order, and asking an order to sell such residue at public auction ; and an order of sale having been granted as prayed, he sold the residue of the goods, on the 9th March, 1863, for \$705 85, and made return of the sale, on the 21st January, 1864. In payment for the goods sold under both of these orders the administrator received Confederate States treasury-notes, and he charged himself with the amount of these notes in his account-current for settlement. The distributees sought to charge him, on the final settlement, with the value of these goods, on the grounds—1st, that the orders of sale were void ; and, 2d, that he had no authority to receive Confederate treasury-notes in payment. The court overruled these objections, held the orders of sale valid, and allowed the administrator's account to stand as stated by him ; to which rulings and decisions exceptions were duly reserved by the distributees.

On the 27th November, 1862, the administrator filed another petition in the probate court, which was as follows : “Your petitioner, Socrates Parker, respectfully sheweth, that he is the administrator of the estate of Henry H. Harris, deceased, duly and legally appointed ; that he has in his possession, among the assets of said estate, a number of bales of cotton, the precise number of which he is not able at this time to state, owing to the fact that some part of it, he believes, was purchased by the intestate as agent for another person, but that the greater part of it belongs to his intestate, as he has every reason to believe ; that the property mentioned is of a character liable to waste, or be consumed by fire ; that he believes he can realize, at this time, fifteen cents per pound for the cotton known to belong to said decedent ; and that it would be to the interest of said estate that so much of it as could be sold for fifteen cents per pound should be sold for that sum.

Your petitioner therefore asks your honor to take cognizance of the matter, and to order a sale of the same, or such parts of the same, at private sale, and to make such orders and decrees in the premises as will enable your petitioner to act advisedly in the premises."

The court made an order, on the same day, in these words: "This day came Socrates Parker, administrator of said estate, and filed his written petition, under oath, whereby it appears, that among the assets of said estate said administrator has in his hands and possession a number of bales of cotton, the precise number of which he is not able to state; that said cotton is of a character liable to waste, or be consumed by fire, and that it would be to the interest of said estate that so much of said cotton as can be sold at fifteen cents per pound be sold at that sum; and asking an order authorizing him to sell said cotton at private sale. It is therefore considered and ordered by the court, that said petition be granted, and that said administrator be, and he is hereby, authorized to sell so much of the cotton belonging to said estate, at private sale, for cash, as he can sell at fifteen cents per pound; and said petition is ordered to record and file."

Under this order, the administrator sold, on the 15th February, 1863, to M. C. Houston, two hundred and fifty-three bales of cotton, at fifteen cents per pound; and made return of his sales to said probate court, under oath, on the 22d January, 1864; the aggregate price being \$19,340 55. Mrs. Harris, the widow of the intestate, claimed one bale of this cotton, under a verbal gift from her husband in his life-time, for the benefit of the "Soldiers' Aid Society;" and the administrator, recognizing the validity of her claim, paid her the price of one bale. The probate court held the evidence insufficient to establish a gift of this bale of cotton, and therefore charged the administrator with its value, which was estimated at seventy-five dollars. The distributees sought to charge the administrator with the value of these two hundred and fifty-two bales of cotton, on several distinct grounds. They insisted—1st, that the order of sale was void; 2d, that the administrator was guilty of bad faith, in asking an order to

sell the cotton, when the interests of the estate did not require a sale, and in selling the cotton at less than its market value, and in being himself interested as a partner in the purchase by Houston. To show the bad faith of the administrator, in asking and making this sale, they adduced evidence showing, or tending to show, that the cotton was worth more than fifteen cents at the time of the sale, and the price steadily increased from that time until the close of the war; that the administrator himself, at the time he asked for and made this sale, was buying cotton on speculation, on his individual account; and that he was openly announced as a partner with Houston in the business of buying and selling cotton on speculation, a few days after the sale of this cotton. The evidence adduced by the parties on these points, as set out in the bill of exceptions, is very voluminous, and an abstract of it is impracticable. The probate court held the order of sale valid, and refused to make any charge against the administrator on the ground of bad faith; to which rulings and decisions exceptions were reserved by the distributees.

This cotton was not delivered to the purchaser until the lapse of nearly a month from the day of sale. Instead of requiring payment of the price in cash, the administrator took Houston's note for the amount, with two sureties, payable to "Mary S. Harris, guardian of the minor heirs of H. H. Harris, deceased." This arrangement was made by and with the consent of Mrs. Harris, who had been previously appointed guardian of her minor children, and who desired by that means to avoid the trouble of lending out the money; and the note was received by her, on a partial distribution of the estate in 1864, as cash. A dispute arose between the administrator and the purchaser, as to the proper date of the note; the former insisting that it should bear date as of the day of the sale, and the latter that the day on which the cotton was delivered was the proper date; and the note was finally dated, by agreement between them, on the 2d March, 1863. These facts were urged by the distributees as additional objections against the sale, and additional reasons for charging the administrator with the value of the cotton; and they reserved

exceptions, also, to the admission of the evidence showing that the note was taken with the consent of Mrs. Harris.

"J. C. Gillespie testified, that shortly after the sale of the cotton by the administrator to said Houston, he, accompanied by said Houston, went around to the houses of the several persons from whom said Harris in his life-time had bought cotton, and carried with him the 'cotton book' used by said Harris for making entries of the weights, number of bales bought, and names of the parties from whom purchased; that the cotton was weighed by him, and turned over to Houston as fast as weighed; that there were eight bales at George Norris', which he could not weigh conveniently, and which he turned over to said Houston according to the weights in the said 'cotton book;' that there were five bales mentioned in said book as delivered at Eppes' warehouse on the river, being part of a lot of twelve bales, which said Harris had bought in his life-time from E. S. Bell, and which Bell was to deliver at said warehouse; that he (witness) weighed seven of the twelve bales at the warehouse, which were properly marked; that there were at the same time five other bales at the warehouse, of the same general appearance as to bagging, size, shape, &c., which Eppes refused to give up, because they were not marked; that one Lipscomb, Bell's overseer, made affidavit that he delivered twelve bales of cotton for Harris at said warehouse, five of which were delivered on Sunday; that he (witness) saw no difference between the five unmarked bales and the other seven, and believed that they belonged to the estate of Harris; that he so told Eppes, and afterwards told said Parker, and also told Parker what the overseer had sworn." On this evidence, the court refused to charge the administrator with the value of these five bales of cotton; to which ruling and decision an exception was reserved by the distributees.

The administrator claimed a credit for four hundred dollars (and interest) paid to Geo. L. Kornegay, and produced as a voucher the receipt of said Kornegay, which was dated the 11th February, 1865; and appended to which were the affidavits of said Kornegay and one Haggard, stating the circumstances under which the money was claimed by

Kornegay. It appeared from these affidavits, and from the testimony of Kornegay on the trial, that the intestate held a note on him, which had been given on a purchase of some land ; that, during the life-time of said Harris, Kornegay handed four hundred dollars to one Alexander, who was Harris' clerk in a dry-goods store, and instructed him to have it credited on this note, but the credit was never entered ; that Kornegay, when afterwards paying the note to the administrator, claimed a credit for this payment, and the administrator promised to refund the amount, with interest, on the presentation of a proper voucher ; that the voucher, with the accompanying affidavits, was accordingly prepared, and the money refunded as shown by Kornegay's receipt. There was no proof of any authority on the part of Alexander to receive the money for Harris, except the fact that he was a clerk in the dry-goods store, and was in the habit of receiving payment of accounts for good sold. It was further shown that said Alexander was perfectly solvent. On these facts, the court allowed the credit claimed by the administrator ; to which ruling an exception was reserved by the distributees.

The administrator claimed a credit, as per voucher No. 21, for twenty dollars paid to D. L. Saunders ; and, to sustain the voucher, produced the receipt of said Saunders for the payment, accompanied by his testimony in court, to the effect that, having hired a negro woman from said Harris in 1862, it was expressly agreed between them that a deduction from the price should be made on account of any loss of time by reason of sickness ; and that the twenty dollars was paid by the administrator, by agreement, on account of such loss of time. The court allowed the credit, and the distributees excepted.

By the account as stated and allowed by the court, there was a balance in the administrator's hands of \$23,353 10, all of which was in Confederate treasury-notes. The court allowed the administrator an attorney's fee of five thousand dollars, and commissions amounting to more than eight thousand dollars. One half of the commissions, however, by his consent, was to be retained by him out of the Confederate money in his hands. For the balance of such

treasury-notes, \$19,049 34, the court refused to render any decree against him, on the ground that they were received by him in good faith, and were valueless. To each one of these rulings exceptions were reserved by the distributees.

The final decree, and all the rulings of the court to which exceptions were reserved, are now assigned as error.

RICE, SIMPLE & GOLDTHWAITE, and COLEMAN, CORNICK & COCKRELL, for the appellants.

W. M. BROOKS, *contra*.

A. J. WALKER, C. J.—The court below overruled the motion to charge the appellee with the value of certain cotton belonging to his intestate, which he had sold. Several reasons are urged against the correctness of this ruling, which must be examined *seriatim*.

1. It is argued, that the order for the sale of the cotton is void, and that the sale being therefore unauthorized, the administrator has converted the cotton, and is chargeable with its value. The order of sale is made in reference to the third section of the act of 16th February, 1854, (Pam. Acts, p. 45; Revised Code, § 2067,) which is in the following words: "The several courts of probate of this State shall have power to order the sale of personal property, *liable to waste, or of a perishable nature*, belonging to the estate of any deceased person, whenever it shall appear by proof, upon the application of the representative of any such deceased person, that such sale would be beneficial to the interests of such estate."

The doctrine was established in this State in 1838, and has been since sustained, that the jurisdiction of the probate court to make orders of sale, such as those mentioned in that section, is maintained, when an application is made conformably to the statute; and it is now held, that no subsequent irregularities vitiate the sale, and that, in determining the question of jurisdiction, when a collateral assault is made upon the order, the language must be construed favorably to the maintenance of the jurisdiction.—*Wyman v. Campbell*, 6 Porter, 220; *Satcher v. Satcher*, at the last term; *King v. Kent*, 29 Ala. 542; *Hatcher v. Clifton*, 33 Ala.

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301; *Wyatt v. Rambo*, 29 Ala. 510; *Matheson v. Hearin*, 28 Ala. 210; *Field v. Goldsby*, 28 Ala. 218; *Doe v. Riley*, 28 Ala. 165.

The ascertainment of the true meaning of this statute is facilitated by a slight transposition of words. Its obvious intent is to give to the probate court power to order, *on the application of the representative*, the sale of the specified character of personal property, *whenever it shall appear by proof* that such sale would be beneficial. The question here is not, whether the petition for the sale would have been good on demurrer. Probably it would not, on the principle that a pleading should aver all that the party is required to prove. The question is, whether the application, which in this case is in writing, made the representation requisite to authorize the court to hear and decide the case. The statute does not require the applicant to represent that the sale would be beneficial to the interests of the estate, but that such fact should appear by proof. The manner in which the fact should appear to the court, is carefully prescribed; and it is not for us to superadd the requisition, that it should appear in another manner. "*Inclusio unius est exclusio alterius.*" There is power to order, on the application of the representative, the sale of certain classes of property; but, after the jurisdiction attaches, in consequence of the application, proof of a particular fact is required. The administrator is not required to represent that the sale would be beneficial, and his failure to do so can not make it void. The authorities above cited clearly show, that the failure to represent such fact, admitting that there was such failure, does not sustain a collateral impeachment of the order. In several of them, there was a clear omission of the court to do things prescribed as preliminary to the order, and an omission to aver them in the initiatory petition; and some of them are made in reference to a law which not only requires proof, but prescribes the mode in which it is to be made. All that is necessary to the validity of the order is, that the application should show the jurisdictional fact. That fact, in this case, is, that the property was liable to waste, or of a perishable nature. Is that shown in the application?

2. The statement of the petition is, that the property was "of a character liable to waste, or be consumed by fire." Liability to waste is one of the grounds of sale; but it is argued, that that ground is not alleged: that the signification of the sentence is, that one of two things is true—either that there is a liability to waste, or a liability to consumption by fire. This construction of the language might be adopted, if we were bound to construe the word in the sense in which it is used by the best writers of the English language, and thus sacrifice the obvious meaning of the petition. "*Or*" is defined to be a "connective, that marks an alternative;" "one of two; either; other." In strict accuracy, such is its signification, (Webster's and Worcester's Dictionaries,) and it would be so understood in demurrers to pleadings. But it is not always used in that sense. It is often, in common parlance, and even in written instruments, used in the sense of *both*. One speaking of a friend, in a city infected with both small-pox and yellow-fever, would scarcely be detected as speaking inaccurately, if he were to say, "my friend is liable to take small-pox or yellow-fever," when he really means that there is an exposure and liability to both. Our Savior says: "For when two or three are gathered together in my name, there am I in the midst of them;" yet the christian world does not understand that text to imply an assurance of his presence when one or the other of the specified numbers are gathered together, leaving it undetermined which. On the contrary, it is understood to convey a promise of presence both in a gathering of two, and in a gathering of three—as well in the one as in the other.

There is no word in the English language more difficult to define, or "of more equivocal import, than the" monosyllable *or*.—Burrell's Law Dictionary, "*Or*." Jarman, in his work on Wills, in reference to the meaning of this word, says: "But by far the most numerous class of cases, exhibiting the change of a testator's words, are those in which the disjunctive *or* has been changed into the copulative *and*, and *vice versa*. It is obvious that these words are often used, orally, without a due regard to their respective import; and it would not be difficult to adduce instances

of the inaccuracy, even in written compositions of some note. It is not surprising, therefore, that this inaccuracy should have found its way into wills."—1 Jarman on Wills, 420, m. p. 443. It has often been held, both in reference to deeds and wills, for the purpose of effectuating the intention, that "or" meant "and," and the instrument was read as if it contained "and" instead of "or."—*Mallory's Case*, 5 Rep. 111; 2 Hilliard on Real Property, 565, § 12; *Wright v. Kemp*, 3 Term, 470; *Denn v. Keemeys*, 9 East, 366; *Wright v. Day*, 16 East, 67; *Jackson v. Blansham*, 6 John. 54; *Janney v. Sprigg*, 7 Gill, 197; *Ray v. Enslin*, 2 Mass. 554; *Oliver v. Heeney*, 2 Edw. 242; *Carpenter v. Heard*, 14 Pick. 449; *Parker v. Parker*, 5 Metc. 134; *Sayward v. Sayward*, 7 Greenl. 210; *Englefried v. Woelpart*, 1 Yeates, 41; *Turner v. Whitted*, 2 Hawkes, 613; *Beall v. Deale*, 7 G. & J. 216; *Den v. Mugway*, 3 Green, 330; *Ward v. Waller*, 2 Spears, 786; *Den v. English*, 2 Har. 280; *Monroe v. Holmes*, 1 Brev. 319; *Bostick v. Lanton*, 1 Spears, 258; *Kelso v. Dickey*, 7 W. & S. 279; *Butterfield v. Haskins*, 33 Maine, 393. We make so extended a citation of authorities upon this subject, because they prove and exemplify the looseness and confusion which prevail in the use of the conjunctions "or" and "and," and the freedom with which the courts adopt the meaning consistent with reason and intention.

The allegation of the petition, that the cotton was "of a character liable to waste, or be consumed by fire," is nonsense, if it be understood to assert the alternative proposition of liability to the one or the other, but not to both. There is nothing in the *liability to waste*, which opposes a *liability to be consumed by fire*, and nothing in a *liability to be consumed by fire* which opposes a liability to *waste*. Cotton certainly may be liable to waste, and is liable to consumption by fire, and a liability to both may exist at the same time. In common conversation, in a will, and in a deed, the language would be understood to assert a liability both to waste and to fire. Why should it be understood differently in this petition? We could only place a different construction by disregarding our own decisions that such

instruments are to be interpreted in a light favorable to the validity of the order.

Another position has occurred to us, as an answer to the argument that the order of sale is void for want of jurisdiction. It is this, that the assertion of the liability of the cotton is a statement that it is perishable, with a specification of the mode of its perishableness; and that therefore, even if the statement of the petition be alternative, in either alternative the court had jurisdiction. We mention the proposition, and cite authorities bearing upon it, but we pass it by as a point which it is unnecessary to decide.—*Steele v. Wyatt*, 23 Ala. 764; *S. C.*, 26 Ala. 639; *Millard v. Hall*, 24 Ala. 209; *Satcher v. Satcher*, at the last term; *King v. Kent*, *supra*; *Hamlet v. Johnson*, 26 Ala. 557; *Ozley v. Ikelheimer*, 26 Ala. 332.

It is also objected to the validity of the order of sale that the petition does not represent the cotton to be "liable to waste," in the language of the statute, but "of a character liable to waste." To sustain this position, would require a niceness of verbal criticism, which would scarcely be permissible in the decision of a demurrer to a common-law pleading. The validity of these orders of sale does not depend upon the employment of the statutory language. They will be sustained, if the expressions can, by aid of a favorable construction, be held equivalent.—*Satcher v. Satcher*, *supra*; *King v. Kent*, *supra*; *Hamlet v. Johnson*, 26 Ala. 557.

3. Another objection to the validity of the order of sale is, that it authorizes a private sale. We are inclined to think, that, because the Code is an entire revision of the law on the subject of sales of decedents' property, and a private sale of crops is expressly authorized, while an advertisement of the time and place of sale is prescribed in most (if not all) other cases of sale; and because the legislature has since authorized a private sale, in the single case of a deceased merchant's goods, that private sales by the representatives of estates, not falling within either of the two excepted cases, and not under a will, are unauthorized by law, notwithstanding there is no express prohibition of

such sales.—*Wyatt v. Rambo*, 29 Ala. 510; *Ikelheimer v. Chapman*, 32 Ala. 676, last paragraph. But this we do not decide, because it is not indispensable. It will be conceded, for the purposes of this opinion, but not as a decided proposition.

Under the law as it existed before the adoption of the Code of 1852, private sales of the property, real and personal, of decedents, were held to be void. But in none of the cases was there an order of court, in a case of which it had jurisdiction, *directing a private sale*.—*Ventress v. Smith*, 10 Peters, 161; *Wier v. Davis*, 4 Ala. 442; *Dearman v. Dearman*, *ib.* 521; *Fambro v. Gantt*, 12 Ala. 298; *Hopper v. Steele*, 18 Ala. 828; *Lay v. Lawson*, 23 Ala. 377; *McArthur v. Carrie*, 32 Ala. 75, which is in reference to a statute of Mississippi, identical with the former law of Alabama—Hutchison's Mississippi Code, pp. 669, 670, §§ 109, 117; *Bragg v. Massie*, 38 Ala. 89. Therefore, the question whether a private sale is void, when made under the authority of a court having jurisdiction of the case, is not *res adjudicata* in this State. Now, it is a principle thoroughly imbedded in the jurisprudence of Alabama, that in these proceedings before the probate court, its erroneous action upon any point arising after jurisdiction has attached, does not render its order or decree for a sale of personalty void. The question whether the sale should be private or public, arose after the jurisdiction attached, and upon the hearing of the cause. As to the power to order a private sale since the adoption of the Code of 1852, no decision has been made by this court. All the decisions are above collected, and refer to sales in this State made before the adoption of the Code; and their validity was, therefore, triable by the previous law. The law of Mississippi, in reference to which one of the decisions was made, was the same with our own law. The statutes before the Code of 1852 expressly declared, that it should be "unlawful" to sell privately, and that the sale should be "at public sale, to the highest bidder." The Code omits thus emphatic and direct prohibition and direction; and the negation of the power to sell privately can only be made out (if at all) by argument, which may, and

no doubt does, strike the minds of different lawyers with different results. We do not affirm, that a negation of power is the less effective, because it is derived argumentatively ; and it is not necessary to do so, for it was never decided, even under the old law, that a private sale of personal property, made in pursuance of an order directing a sale in such manner, was void.

We introduce this contrast of the manner in which the negation of the power of private sale was derived under the old law, and the manner in which it is supposed to be derived under the present law, because, under the latter state of the law, the argument is at least more striking ; and for the additional reason, that the decision in *Lay v. Lawson* (p.390) expressly bases the decisions, holding private sales void, on the positive assertion that it is unlawful to make them ; and the argument proceeds upon the concession of the propriety of a different ruling, in the absence of that assertion. The case we have before us is this. An administrator in his petition prays an order for a private sale, thus imposing upon the court the inevitable duty of deciding the question of private or public sale ; the petition was received ; the court thus acquired jurisdiction to decide the question ; the question is one about which lawyers and judges may differ ; he decides the question, as we must infer, according to the dictates of his judgment, enlightened by all attainable information. It would be truly a destructive doctrine, that his decision upon a question of such a character, falling within the scope of his authority to adjudicate, was absolutely void. It is admitted, that, if the jurisdiction of the case depended upon the publicity of the sale ordered, the law would be different ; for an erroneous decision that a fact gives jurisdiction is not enough. But here the jurisdiction had already resulted from the reception of the petition, containing the requisite allegations. From the conclusion that the order directing a private sale was not void, it is a corollary, that the sale made in obedience to it was likewise not void.

4. It is argued, that the administrator had a secret interest in the purchase of the cotton. If so, it is a ground for

setting aside the sale, in a direct application for that purpose, but not for treating it as void for every purpose.

5. For the purchase-money of two hundred and fifty-two bales of cotton, a note with two sureties was taken, payable to the guardian of the decedent's children. This was done with the approbation of the widow, who was the guardian of the other distributees, and who wished to avoid the trouble of loaning the money; and such note was accepted as cash. We can perceive no injury or loss resulting from this act, nor can we perceive any very censurable irregularity in it. Certainly, it does not render the sale absolutely void.—*Lay v. Lawson, supra.*

6. We are of the opinion that the cotton was sold for its value. No charge, therefore, can be predicated of the price at which the cotton was sold. It is contended, however, that it would have been better for the estate, had no sale been made; that the interest of the estate was not consulted in obtaining the order for the sale of the cotton; and that therefore the administrator is chargeable. If the cotton could have been preserved until the war closed, and then saved and sold, the estate would certainly have been benefited. This may be safely pronounced in the light of events after their occurrence. But the question of the expediency of the sale was determinable on the 27th November, 1862, when the sale was ordered, in the light of the manifestations of that time. Who can affirm that a judge, or a trustee, guided by the manifestations of the times, during the period from November, 1862, to February, 1863, unwisely concluded that a sale comported with the true interests of the estate? Who can affirm that, amidst the disorder and convulsions which subsequently ensued, the cotton would not have been lost, if it had been retained in specie? Who can affirm that a judge and an administrator, in November, 1862, were blind to the teachings of the times, which guided and controlled prudent men in the management of their own affairs, when they failed to solve the existing problem of war and politics, and, looking down the vista of time, through the results of battles as yet not fought, and through complications of diplomacy and statesmanship as yet not developed, failed to perceive with the

ken of a prophet that the existing government over them, and its currency, were destined to overthrow? If an administrator is charged for a failure in these particulars, an exaction is visited upon him, *not merely of uberrima fides*, but of a sagacity more than human.

The ascertainment of the policy of the petition for the sale of the cotton, and the making of it, constitute a step in the line of the administrator's duty. It was not a departure from the law-appointed line of duty. An administrator may act within the line of his duty, and yet, by bad faith; or the want of care and diligence, render himself liable.—*Clough v. Bond*, 3 M. & C. 491. But, for reasons which we have already given, we can not conclude that the administrator, in petitioning for the sale, has, in reference to the policy (supposed to be now demonstrated) of retaining the cotton, acted in bad faith, or without reasonable care and diligence. The *onus* of proving these imputations of bad faith or a want of care and diligence, when the administrator has acted within the line of his duty, is upon the adverse party.—*Pearson v. Darrington*, '32 Ala. 227, 247, § 9; *Clough v. Bond*, *supra*; *Gerald v. Bunkley*, 17 Ala. 170.

The bad faith of the administrator, in seeking the authority to sell, is argued from the contrariety of policy adopted by him in the conduct of his own affairs with that which he adopted for the estate. The proof upon this subject shows that, at the very time when the administrator was proceeding to sell the cotton of the estate, he was buying cotton for himself, and engaged in a partnership for the purchase and sale of cotton on speculation. The fact that he was willing himself to incur, with his own funds, the hazard of a cotton speculation, does not demonstrate the conviction of his mind that it was politic to retain the cotton of a decedent's estate. It is not at all unreasonable, that he should entertain the conviction that his own interest would be promoted by embarking in such a speculation, and yet that the good of the estate required a sale of its cotton. His willingness to incur the hazards of such an operation does not prove that a wise and prudent administrator should have retained the cotton. In so far as the mere making of the sale, in obedience to the

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valid order of the court, is concerned, he can not be subjected to charge. The question of the consistency of the sale with the interest of the estate is by law referred to the judicial mind, the enlightenment of which by proof is required by the statute. If the court acted without proof, or decided incorrectly upon such question, (it not pertaining to the jurisdiction,) the administrator can not be chargeable on account thereof. The weight of the eight bales of cotton at George Norris' seems to have been fixed in the sale of it by the cotton-book of the decedent. If there is any ground to charge the administrator on account of his omission to weigh the cotton, it has not occurred to us.

7. The testimony shows, with reasonable certainty, that the five bales of cotton, a part of a lot of twelve bales sold by E. S. Bell to the intestate, which was left by the administrator's agent in Eppes' warehouse, belonged to the estate; and shows very clearly that, if they did not, the warehouseman was liable. It further appears that the administrator was notified of the facts, and apprised of the agent's opinion that the cotton belonged to the estate. The administrator neither claimed, nor attempted to recover the cotton, or its value. There does not, however, appear to have been *intentional* wrong on the part of the administrator. There was no complicity by him, so far as we can discover, in the conversion. He is not presented as a convertor, or as a willful tort-feasor. His wrong is mere negligence. If he had converted the property, he might have been charged by the probate judge with the highest value.—*Hudson v. Helmes*, 23 Ala. 585. Even if the administrator had sued for the conversion of the cotton, his recovery of the highest value would not have been a matter of course, but would have been a matter left to the jury. We think substantial justice is satisfied, and correct principles of law consulted, in charging the administrator, upon the circumstances before us, with the value of the cotton at the time of its loss by negligence, with interest on that value.—*Steele v. Knox*, 10 Ala. 608; *Hatchett v. Bozeman*, at the present term.

8. The appellants contend, that the order of sale of a stock of goods, and the sale made in pursuance thereof, are void, and that the court below erred in not charging

the administrator on the hypothesis of the invalidity of the order and sale. If the order of sale is valid, it must be by virtue of the act of 5th February, 1858.—Pamphlet Acts, p. 307; Revised Code, § 2074. It is too clear to be the subject of argument, that there is no other statute to the authority of which it can be referred. The language of the act of 1858, so far as it is necessary to examine it, is as follows: "Whenever any person, engaged in mercantile business in this State, shall die, leaving a stock of goods, wares, or merchandise, and leaving no surviving partner in said business, it shall and may be lawful *for the executor, or administrator of the decedent*, to sell such stock of goods, wares, or merchandise, either at public or private sale, and either at wholesale or retail, upon first obtaining an order for such sale, in the manner hereinafter provided, from the probate court which granted his letters testamentary or of *administration*. To obtain *such order of sale*, *the executor or administrator, applying for such order*, must file in said probate court an application in writing, setting forth with reasonable certainty the kind, quantity, and estimated value of said goods, wares, or merchandise, and any facts or circumstances which may render it necessary or expedient; which application must be verified by oath," &c.

It is obvious that, under this statute, the only person authorized to make the application, is the executor or administrator of a particular *sort* of decedent. The executor or administrator "*of such decedent*" may obtain the order of sale on application. The sort of decedent, whose administrator may obtain an order of sale, is one who was "engaged in mercantile business," and died leaving a stock of goods, wares, and merchandise, and leaving no surviving partner. Neither the petition, nor the recitals of the court, in this case, show that the administrator was the administrator of such a decedent. We understand the decisions on this subject to be, that the jurisdiction of the court depends upon the proper representation by the proper person. The sale of the stock of goods was void, and the administrator must be charged with the value thereof, as if he had wrongfully converted the same to his own use.

9. Personal property of the estate was sold, and debts

collected, and Confederate money taken in payment. This court has held in a series of decisions, commencing with *Watson v. Stone*, (40 Ala. 451,) that under the act of 9th November, 1861, (p. 53,) the administrator stands justified in taking Confederate money. We abide by that decision. The administration in this case commenced after the passage of the act. The administrator was properly exempted from the payment of \$19,049 34 in Confederate money on hand.

10. It was right to allow the administrator the reasonable counsel fees paid out for services in resisting an attempt to impose incorrect charges upon him, The administrator should be allowed reasonable fees paid counsel for aid to him officially, except in the maintenance of incorrect positions taken by him in contests with the distributees.—*Smith v. Kennard*, 38 Ala. 695 ; *Pickens v. Pickens*, 35 Ala. 442.

11. We do not think the administrator has been guilty of such willful default, or gross negligence, resulting in loss to the estate, as will deprive him of his commissions.

12. Upon another trial, the probate court should charge the administrator, in every case, in which the estate has been injured, or a debt has been lost, by his failure to sue upon the same within a reasonable time.—*Bondurant v. Thompson*, 15 Ala. 202 ; *Dean v. Rathbone*, 15 Ala. 328.

13. It seems from the evidence that the intestate had stock in the *Livingston Insurance Company*. A partnership, of which the intestate was a member, also had stock in the same company. Parker, the administrator, and a partnership of which he was a member, had stock in the same company. A resolution was adopted for the dissolution of the company, and a distribution of the assets among the stockholders. Two bills of exchange were delivered to the administrator, by the secretary of the company. If it appeared that these bills of exchange were delivered to him in satisfaction of the intestate's interest in the assets, the administrator should have been charged with the same. But such does not appear to have been the case, but the

contrary is inferable from the evidence. If there has been any loss to the estate, in consequence of the negligence of the administrator in prosecuting the claim of his intestate to a share of the assets, he should be charged with the amount of such loss. We do not perceive from the record that any loss has supervened from his negligence, and we do not now see any ground justifying a charge against him in reference to this matter.

14. The probate court erred in allowing voucher No. 54 as a credit. The intestate had a note upon one Kornegay, given for land. The debtor handed four hundred dollars to one Alexander, who was a clerk in the intestate's store. The clerk had no authority to receive the money. The reception of the money was entirely outside of the scope of his agency. It does not appear that the money was ever received by the payee. No credit was entered upon the note. The administrator collected the entire note, and afterwards returned the four hundred dollars, with interest. Upon the proof in the record, which we are informed is all which was adduced, the administrator erred in the payment, and the credit should have been denied him.

There was no error in allowing voucher No. 21, being a credit of \$20 paid D. L. Saunders.

Reversed and remanded.

BYRD, J.—I dissent from so much of this opinion as relates to Confederate treasury-notes, and refer to my opinion in the case of *Scheible v. Bacho*, at this term, for my views on this subject.

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[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Proof of handwriting.*—Where a witness is competent to testify to handwriting, and it is permissible to question him as to the genuineness of a signature, a part of the signature may be concealed from him, and he may be asked in whose handwriting the part shown him is.
2. *Competency of parties as witnesses.*—On the trial of an issue before the probate court, between the administrator and the distributees of an intestate's estate, as to the genuineness of the signature to a note, which purports to have been executed by the intestate, payable to the administrator, and which the administrator claims as a credit on the asserted right of retainer ; a distributee of the estate, being a party to the proceeding, is not competent as a witness against the administrator. The case falls within the exception to the act approved February 14, 1867, (Revised Code, § 2704,) which exception is in these words : "Except that in suits or proceedings by or against executors or administrators, (as to which a different rule is not made by law,) neither party shall be allowed to testify against the other, as to any transaction with, or statement by the testator or intestate, unless called to testify thereto by the opposite party."
3. *Error without injury, in reception of illegal evidence by court.*—On the trial of an issue before the probate court, without the intervention of a jury, the admission of illegal evidence is, at most, error without injury, since the appellate court, in passing on the merits of the case, will consider only the legal evidence.
4. *Comparison of handwriting.*—As to proof of handwriting by comparison the following general rules may be laid down, as the result of the authorities : 1st, that it is not allowable for either witnesses or juries to compare the handwriting of papers not in evidence for other purposes, with the disputed writing or signature, with the view of arriving at a conclusion as to the genuineness of the latter ; 2d, that there is no difference, in this respect, between the competency of an expert and of a person who has never seen the party write ; 3d, that the jury may institute a comparison between the disputed writing or signature and other writings or signatures which are proved to be genuine, and which are in evidence before them for other purposes, in order to arrive at a conclusion as to the genuineness of the former ; and, 4th, that the doctrine as to experts, in such cases, "relates to ancient writings, which are not proved by their antiquity, and to giving their opinion as to the genuineness of a signature or writing, founded on a knowledge of the handwriting of the party by whom it is said to be written ; or, in the case of bank-bills, on a knowledge of the genuineness of bills of a

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similar character, and some skill and experience possessed by the witness in detecting counterfeits, which are not possessed by the mass of men ; and, perhaps, to an opinion as to whether a signature is genuine or counterfeit, without having an acquaintance with the handwriting in dispute, but not by comparison."

5. *Right of retainer by administrator.*—An administrator has a right to retain assets, in payment of a debt due to him from the intestate ; and is entitled to a credit on final settlement, for the amount of such debt, on such proof as would authorize a recovery on the debt in an action against the intestate, if living.
6. *Trial of issue of non est factum before probate court.*—There is no statute now in existence in this State, which authorizes the probate court to empanel a jury to try an issue of *non est factum*, when it arises on the final settlement of an administrator's accounts.
7. *Review of decision of probate court on contested question of fact.*—In reviewing the decision of the probate court on a controverted question of fact, which was tried before the court without the intervention of a jury, the appellate court will not reverse the judgment, except in cases where, upon established legal principles, the verdict of a jury would be set aside by the court.
8. *Burden of proof on trial of issue of non est factum.*—On the trial of an issue before the probate court, between the distributees and the administrator of an intestate's estate, respecting the genuineness of the intestate's signature to a promissory note, payable to the administrator, which the administrator claims as a credit on the doctrine of retainer, the burden of proof is on him, as on the plaintiff in an action at law ; and, as in other civil cases, a mere preponderance of evidence does not necessarily entitle him to a verdict.

APPEAL from the Probate Court of Talladega.

IN the matter of the estate of Isaac Kirksey, deceased, on final settlement of the accounts and vouchers of Albert O. Kirksey, as administrator. The record does not show when the intestate died, nor when letters of administration on his estate were granted to said Albert O. Kirksey. The final settlement was made on the 21st September, 1867. The administrator claimed a credit, as per voucher No. 29 in his account as stated, for the amount of a promissory note for four thousand dollars, which purported to be signed by the intestate, and to have been given for money loaned, was dated the 25th May, 1859, and was payable on the 25th December, 1859, to said Albert O. Kirksey. The widow of the intestate filed written objections to the allowance of this note as a credit to the administrator, on the ground that "said note was not executed by the said Isaac

Kirksey, nor by any one authorized to bind him in the premises ;” and she made oath of the truth of the facts stated in her objections. “Issue being made up,” as the bill of exceptions states, “on the sworn exception to said voucher No. 29, the following proceedings were had :

“The administrator offered the note in evidence, and, in connection therewith, offered B. F. Burns as a witness, who testified as follows : ‘I am not interested in this suit. I was acquainted with the deceased in his life-time, and lived two miles from him, and had frequent transactions with him. I am well acquainted with his handwriting, and believe the signature to the note in controversy to be in his handwriting.’ The note in controversy, which was shown to the witness, is hereunto attached as an exhibit. On cross-examination, voucher No. 18, which is also hereunto attached as an exhibit, was shown to the witness ; as to which he testified as follows : ‘I know it to be in the handwriting of the deceased. There is a difference between the handwriting of the signature to said voucher and the signature to the note ; the difference is in the small *k* and *r* in *Kirksey*, but no greater than in the writing of other men at different times. I cannot say positively that the signature to the note is in the handwriting of the deceased ; but, if it is not, it is the best counterfeit I ever saw.’ On re-examination he said, that there was a difference in the handwriting of the deceased ; and two deeds being exhibited to him, which are also hereunto attached as exhibits, he testified, that he saw the deceased sign them, and that the signature to the note was in the same handwriting. Being again cross-examined by the distributees, he said, that there is a difference between the signatures to the deeds and note ; that all of them are different ; that the difference is in the letter *k* in the word *Kirksey*.

“The administrator having here rested, Wyatt Taylor, senior, was introduced as a witness by the distributees, and testified as follows : ‘I was acquainted with the deceased in his life-time, have frequently seen him write, and am well acquainted with his handwriting. The signature to the note is not in his handwriting. There is a difference in the *I* in *Isaac*, and in the *k* in *Kirksey* ; and the signa-

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ture is in a much finer hand than he ever wrote.' [On cross-examination.) 'I have often seen him write. The signature to the note is nothing like his handwriting.' The witness was here shown the name *Isaac*, in the signature to a paper which purported to be executed by said Isaac Kirksey, while the rest of the signature, and every other part of the paper, except the magistrate's certificate of acknowledgment, was concealed from him; and was asked, 'In whose handwriting is the word *Isaac*?' The distributees objected to the question, unless the whole name [were] shown to the witness. The court overruled the objection, and the distributees excepted. The witness answered, 'It is in the handwriting of Isaac Kirksey.' Being re-examined by the distributees, he said, that he had taught school for thirty years, and had been a book-keeper, and was well acquainted with different handwritings. The distributees here asked the witness, whether he might not, on a more careful examination, find that the signature to said paper last shown him might not be in the handwriting of the deceased; to which question the administrator objected, as leading; but, before action was taken by the court on the objection, the witness said, that it was not Kirksey's handwriting—that the *I* and *a* were very different from his handwriting. The witness was here shown the signatures to the two deeds which had been shown to the witness Burns, and was asked if they were in the handwriting of said Isaac Kirksey; to which he answered, that they were in his handwriting, and he supposed that he wrote them. Both deeds were shown to him, and he was asked if there was not a difference between the two signatures; to which he answered, that there was a difference, but not so great as between the two deeds and the note in controversy; that the letters *I* and *a* were very different; that he was well acquainted with the handwriting of said Isaac Kirksey, and that the signature to the note was not his.

"William Montgomery, another witness for the distributees, testified, that he knew the deceased in his life-time, and was acquainted with his handwriting; that the signature to the note, in his opinion, was not said Kirksey's; that neither the *k* nor the *r* was as he usually wrote; and

that the signature to the note seemed to be in a better hand than he usually wrote. Witness was the successor of said Kirksey as a justice of the peace, and had the books used by him while in the office, and became acquainted with his writing in that way. Being shown the deeds above mentioned, he said, that there was a difference in the letter *I* in *Isaac*, and in the letters *k* and *r* in *Kirksey*. Witness wrote the name *Isaac*, as to which the witness Taylor was examined. On cross-examination he said, that there was a difference in the letter *I* between the signatures to the deeds and the note; and being shown a paper, which was admitted to be in the handwriting of the deceased, said, 'It is in his handwriting, but I do not think it as good as the signature to the note.' Being re-examined by the distributees, he said: 'I have known the deceased for thirty-one years. He was an old man, over fifty years of age. There is a difference between the signatures to the deeds and the note. The signature to the note is in a better hand than the signatures to the deeds. I would recognize the signatures to the deeds as Kirksey's.

"James Montgomery, another witness for the distributees, testified as follows: 'I have known the deceased since 1835, and often saw him write, some years ago. I was one of the appraisers of his estate. I have been a merchant most of my life, and am acquainted with the handwriting of the deceased. I have examined the note in controversy, and do not believe the signature to be that of the deceased. It is in a smoother and better hand than he wrote. I have never seen any of his writing as good as the signature to the note. He was a laboring man, and a blacksmith by trade.' [Cross-examination.] 'I had no intercourse with the deceased for many years. We were unfriendly. I give my opinion of his handwriting, principally, from examining papers since his death. There is not as much difference between the signatures to the two deeds, as between the signatures to them and the note, though there is a difference between the signatures to the two deeds.' An account, which was admitted to be in the handwriting of the deceased, and which is hereunto attached as an exhibit, was here shown to the witness; as to which he said, that the

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signature to it was as good as that to the note ; also, that the signature to the note was in a lighter hand than the deceased usually wrote.

“The distributees here offered as witnesses John G. Kirksey, W. H. Kirksey, Mrs. Wensell, and her husband, (the three former being children of the deceased, and distributees of his estate,) and offered to examine them as to the signature to the note in controversy ; to which the administrator objected, on the ground that they were parties to the suit, and parties in interest, and could not testify about a transaction with the deceased. The court sustained the objection, and the distributees excepted.

“Wyatt Taylor, jr., another witness for the distributees, testified, that he was acquainted with the deceased in his life-time, was acquainted with his handwriting, and lived several years on the same place with him ; that the signature to the note was not in the handwriting of the deceased ; that the signatures to the said two deeds were in his handwriting, and were different from the signature to the note ; that the *I* and the *k* were different. On cross-examination he said, that he had often seen the deceased write ; that the signature to the note was in a finer hand than those to the note ; that he (witness) was twenty-three years old, went into the army early in the war, and remained there until its close ; and that the deceased was dead when he returned home.

“Andrew Lawson, a witness for the administrator, testified as follows : ‘I have never been a book-keeper, and am not expert in detecting the differences in handwriting, having never had my attention specially directed to such differences. I have been the sheriff of the county, and kept the books of my office ; and also kept the books of Easley and Terry while they held the office. I have written, probably, one thousand pages on the sheriff’s books, and have witnessed the signatures of a good many men. I saw the signature of Isaac Kirksey once during my term of office. It has been a long time since I saw his handwriting, and I do not know that I am acquainted with it.’ The distributees objected to this witness as an expert, on the ground that a sufficient predicate had not been laid ; which objection the

court overruled, and they excepted. The said note and two deeds were then shown to the witness ; as to which he said, that, in his opinion, there was no greater difference between the signatures to the deeds and to the note, than there was among them all ; that the signature to the note was in a lighter hand than the signatures to the deeds ; that the *k* and *a* were differently formed ; that the signature to the note looked like Kirksey's signature to the note he had seen. On cross-examination he said, that the enamel was rubbed off where the signature to the note was written, but more of it was off where the word *Kirksey* was written ; that the signatures to the note and deeds were different in appearance ; that the signature to the note was in a better handwriting ; that he could not say the signature to the note was in the handwriting of the deceased, as it had been a long time since he had noticed his handwriting.

"John C. Walker testified, that he heard a conversation between said Isaac Kirksey and A. O. Kirksey, in 1861, in which the latter offered to buy from the former a negro man, who was then a runaway, and to credit the price on a note which he then held against said Isaac ; and that said Isaac replied, that he would not sell the negro, as the balance of his negroes would run away if he did, just to be sold, and that he could pay the note in money without selling the negro. On cross-examination he said, that he heard nothing in regard to the date or amount of the note ; that the deceased was a man of means, was very economical, and was in the habit of lending money. Burgess, a witness for the administrator, testified, that he saw the note in controversy, in the possession of A. O. Kirksey, in 1861. On cross-examination he said, that he could not read or write, and only knew the note by the size of the paper on which it was written, and by the endorsement on it ; that there was writing on the back of the note, at the top and bottom, but the writing in the middle had been done since he saw the note ; that he was living with A. O. Kirksey at the time he saw the note, and walked into the room while he was looking over his papers ; that Kirksey showed him the note, and he had it in his hand.

"R. A. McMillan testified, on the part of the administra-

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for, that he had been engaged for a long time in merchandizing, and had done a good deal of business in writing for twenty-five years; that he had some skill in detecting differences in handwriting, but was not skilled when unacquainted with the hand; that he had seen Isaac Kirksey's handwriting a good many years ago, had seen him write his name, and thought he would recognize his handwriting. The distributees here objected to the examination of said witness as an expert, on the ground that a sufficient predicate had not been laid. The court overruled the objection, and the distributees excepted. The witness was then shown the note, the two deeds above named, and other papers admitted to have been signed by said Kirksey, [and said,] that it had been a long time since he had seen said Kirksey's handwriting, but he believed the signature to the note to be his. On cross-examination he said, that the signature to the note was in a smoother hand than the signatures to the deeds and other papers; that he saw two marks between the letters *k* and *s* in the word *Kirksey*, in the signature to the note, which looked like a stroke of the pen where it had failed to shed ink; that there was a difference between the signatures in the letter *k*, and also in the smoothness of the handwriting in the word *Isaac*; and that he did not now believe he had any distinct opinion as to whether the signature to the note was, or was not, in the handwriting of the deceased. On examination in rebuttal he said, that it hardly ever happens that so great a difference exists in the handwriting of the same person, on account of different pens, ink, and paper, and the state of the nervous system, as there is between the signatures to the note and to the other papers shown him.

"This being all the evidence, the court allowed the administrator to retain the amount of voucher No. 29, together with interest thereon; to which ruling and decree the distributees excepted."

The several rulings of the court to which exceptions were reserved by the distributees, and the final decree allowing the voucher claimed by the administrator, are now assigned as error.

BISHOP, WINBOURN & WALDEN, for the appellants.

BRADFORD, MARTIN & ISBELL, *contra*.

BYRD, J.—The first assignment of error raises the question, whether, in a case involving the genuineness of the signature of the maker of a promissory note, which is the foundation of the suit or controversy, a witness may be shown a signature of the maker to another instrument, purporting to have been signed by him, and, concealing a part of the name from the witness, asked, in whose handwriting is the part shown him. The appellants objected to the question being asked, “unless the whole name *shown* to the witness.” Without deciding whether such evidence is admissible on the issue made up in this case, as that question is not raised by the exception, we hold, that it only raises the point, whether the witness should have been allowed to testify as to a part of the name of Isaac Kirksey, without seeing it all. The phrase, “unless the whole name [was] *shown* to the witness,” serves to point out a specific objection; and the party excepting must be held to that, as the ground of his objection. If it had been admissible to make such proof in this case, we can see no reason why it was not permissible for a party to show the witness a part of the signature, concealing the balance, and ask him in whose handwriting the part shown was. Such a mode of examination may be allowable, to test the *capacity* of the witness to testify to the handwriting of the supposed maker of the instrument, or for other purposes.

2. The second assignment of error raises the question of the competency of the distributees of an estate to testify as to the genuineness of the signature of the intestate to a promissory note payable to his personal representative, and claimed by the latter as a credit on a final settlement of his administration of the estate. The statute under which they claimed the right to testify, so far as it is applicable, is as follows: “That in suits and proceedings before any court or officer in this State, other than criminal cases, there shall be no exclusion of any witness, because he is a party, or interested in the issue tried; except that in suits or proceedings by or against executors or adminis-

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trators, (as to which a different rule is not made by the laws of this State,) neither party shall be allowed to testify against the other, as to any transaction with, or statement by the testator or intestate, unless called to testify thereto by the opposite party." This is evidently a *proceeding* by an administrator, before a court of this State; and the "matter in controversy" is the genuineness of a promissory note, *purporting* to have been executed by the intestate. The persons offered as witnesses are distributees of the estate, and a husband of one of the distributees, and are parties to the proceeding. To allow the administrator to testify "as to the signature to the note *in controversy*," would be allowing him to testify "as to a transaction with the intestate," within the meaning of the statute, and he would, therefore, be an incompetent witness under the act, *for that purpose*; and hence, the other parties must be held to be incompetent. The court committed no error in its ruling on this question.—*Stuckey v. Bellah*, at the present term.

3. The third and fourth assignments of error may be disposed of together. It does not appear from the record that the appellee offered the witnesses Lawson and McMillan as *experts*, otherwise than by the objection of the appellants; which objection the court overruled, without assigning any reason therefor. The evidence given by the witnesses was not objected to. If it had been, it would have raised questions upon which the American courts have been much divided. We can see nothing in the evidence of these witnesses, which was admissible only upon the doctrine applicable to *experts*. Part of their evidence was clearly admissible, and other parts were objectionable; and, if they had been experts, would not have relieved that evidence from such objection. In other words, they testified to no fact, which would have been admissible upon the ground *alone* of their expertness. All the evidence being set out, and being addressed to the court, and not to a jury, it was, at most, error without injury; *even* if the witnesses, upon the evidence, were not experts. In passing on the merits of the case, we must look at the evidence as the probate judge should have done; and consequently no injury will

result to appellants from the admission of illegal or irrelevant testimony.

4. The fifth assignment of error raises the last, and the most important question involved in the decision of this cause. In the determination of this question, it is proper, in the condition of this record, to lay down some rules, as to the evidence which should be considered by the court, and the weight to be attached to such as is admissible, under the issue presented. That issue is, whether the signature to voucher 29, upon the evidence, is the genuine signature of Isaac Kirksey.

Much evidence is contained in the record, as to the genuineness of the signature of Isaac Kirksey to other papers, having no connection with the cause; and those papers were introduced as evidence, and are attached to the transcript in this cause, for the inspection of this court; and witnesses were allowed to compare the signature to such papers, with that to the note in controversy, and to give their opinions, upon such comparison, as to the genuineness of the signature to the note. There is, perhaps, no branch of the law, which has given rise to such a contrariety of adjudications in this country, as that which relates to the evidence above referred to. It would be a laborious, if not an useless task, to attempt to review, or to reconcile, the various decisions on this recondite offshoot of American jurisprudence. I shall only notice them so far as we are disposed to follow them.

In the case of *Little, adm'r, v. Beazley*, (2 Ala. 703,) this court said, that "comparison of handwriting, by submitting different writings having no connection with the matter in issue, is not permitted by law. The present case presents the naked question, whether signatures proved to be in the defendant's writing can be given in evidence to the jury, to enable them to determine, by a comparison with the disputed signature, whether the latter is genuine or otherwise. In our opinion, this was not competent evidence."

In *The State v. Givens*, (5 Ala. 754,) Collier, C. J., in delivering the opinion of the court, said: "It is laid down as a general rule, in the law of evidence, that it is not allowable to prove the handwriting of a party, by a mere com-

parison of the disputed paper with a writing admitted or proved to be genuine. A witness, required to testify on the subject, must possess a previous knowledge, acquired by having seen the party write. This rule has been relaxed, where the writings are so ancient that they can not be proved by living witnesses, and yet are not of such antiquity as to prove themselves."

In *Bishop v. The State*, (30 Ala. 41,) this court held, that a genuine signature can not be given in evidence, for the purpose of enabling the jury to compare the handwriting with that of the supposed forged instrument; and recognized the rule, "that papers foreign to the controversy, and having no connection with the case on trial, can not be laid before the jury for any such purpose;" and further, "that when the question of forgery is involved, and other papers bearing the disputed signature are legitimately before the jury, the papers themselves being pertinent to the issue on trial, the jury may institute a comparison." However refined this distinction may be, yet there is abundant authority in support of it.

In *Johnson v. The State*, (35 Ala. 378,) it was held, that a witness who was acquainted with the genuine bills of a banking company, and who had a knowledge of counterfeit bank-bills, could give his opinion of the genuineness of a bank-bill of such company.

Mr. Starkie says: "Evidence by *comparison* of hands is not admissible."—Vol. 2, p. 515. And he puts the rule upon the ground, "that if such comparisons were to be allowed, it would open the door to the admission of a great deal of collateral evidence, which might branch out into a very inconvenient length." He also asserts the doctrine, that the jury may compare "writings in evidence before them for other purposes, and proved to be in the handwriting of the party whose handwriting is disputed, and which are not selected by the party for the purpose of comparison," with the disputed signature. He also says, that the veracity of a witness, speaking to the handwriting of the defendant, can not be tested by putting into his hand another paper, purporting to be the writing of the defendant, and asking the witness whether it is in the handwriting of the defend-

ent or not.—*Ib.* 518. To the same effect, see Phillipps on Evidence, vol. 2, p. 609; also, note 4, on pages 603-08, where the decisions of the courts of many of the States are collated.

Upon the subject of comparison of handwritings, Mr. Greenleaf says, upon an examination in chief, "the modern English decisions are clearly opposed to it." And two reasons, he says, have been assigned for the rejection of such evidence—1st, the danger of fraud in the selection of the writings offered as specimens; and, 2d, the multiplication of collateral issues, and the subversion of justice; and he then proceeds to say: "to which may be added the danger of surprise upon the other party, who may not know what documents are to be produced, and, therefore, not be prepared to meet the inferences drawn from them. The same mischief would follow, if the same writings were introduced to the jury through the medium of *experts*."—1 Greenl. Ev. § 580. But *experts* have been allowed to testify whether a writing is a real or a feigned hand, and may compare it with other writings already in evidence in the cause.—*Renet v. Braham*, 4 T. R. 497; *Mooddy v. Rowell*, 17 Pick. 49; *Lyon v. Lyman*, 9 Conn. 55.

In the case of *The King v. Cator*, (4 Esp. 117,) which was a prosecution for libel, evidence was admitted "to establish the fact of the libellous letters being of the defendant's handwriting. The counsel for the prosecution produced several letters, avowedly written by the defendant; in fact, written to the prosecutor, in answer to letters written by the prosecutor to him; and proved the fact, clearly, that the letters were in the handwriting of the defendant; and then it was proposed to call a clerk, who held the place of inspector of franks in the postoffice, to prove that the hand in which the libels were written was a feigned one; and to prove that, notwithstanding the disguise, the hand in which the libels were written, was the same with that of those letters admitted to be the defendant's handwriting in the letters above stated."

After a full and most thorough argument, it was held by the court, that the evidence of the witness proving "the hand in which the libels were written was a feigned one,"

was admissible. And it is apparent from the case, and the opinion of the court, that it was held admissible on the ground, that the witness was an *expert*. But the court held, that the evidence of the same witness, to the effect that "the hand in which the libels were written, was the same with that of those letters admitted to be the defendant's handwriting," was inadmissible. The court uses this language: "It is said to him (the witness), 'Now look at this paper, and tell me, if the same hand wrote both.' Why, one can not help seeing, evidently, what must be the consequence. I can not conceive there is anything in the idea of a comparison of hands, if this is not to be considered as comparison of hands. The witness says, 'I never saw him write in my life.' Why, then, I collect all my knowledge of his being the author of this, by comparing the same hand with that which other witnesses have proved to be a natural hand; by looking at the two, he draws his conclusion. It seems to me, therefore, directly and completely a comparison of hands." This case is in full accord with the text of Mr. Greenleaf, above quoted. It was also held, that there is no distinction, as to its admissibility as evidence, between a criminal and civil case.

The following cases will show the doctrine which has been held on these questions: *Guerney et al. v. Langlands*, 5 Barn. & Ald. 330; *Moody v. Rowell*, *supra*; *Bank of Penn. v. Huldeman*, 1 Penn. 161; *Moye v. Herndon*, 30 Miss. (1 George,) 140. See, also, cases referred to in 1 Greenl. Ev. p. 726, §§ 580-81, and notes 2 and 3.

From the authorities reviewed, the following general rules may be laid down: 1. That it is not allowable for witnesses, or juries, to compare the handwriting of papers not in evidence *for other purposes*, with the disputed writing or signature in evidence, with the object of arriving at a conclusion as to the genuineness of the latter. 2. That, in this respect, there is no distinction between the competency of a witness who has seen the party write, and an *expert* who has never seen him write. 3. That the jury may institute a comparison between writings or signatures in evidence before them for other purposes, proved to be genuine, and the disputed one, in order to arrive at a conclusion as to

the genuineness of the latter. 4. That the doctrine as to *experts*, as applicable to signatures or writings, relates to ancient writings, which are not proved by their antiquity; and to giving their opinion as to the genuineness of a signature or writing, or its being a counterfeit, founded on a knowledge of the handwriting of the party by whom it is said to be written; or, in the case of bank-bills, on a knowledge of the genuineness of bills of the character in dispute, and some skill and experience that the witness may possess in detecting counterfeits, not possessed by the mass of men; and, perhaps, to an opinion as to whether a signature is genuine or counterfeit, without having any acquaintance with the hand in dispute, but not by comparison.—*Johnson v. The State*, 35 Ala. *supra*; *Fulton v. Hood et al.*, 34 Penn. St. R. 365; and authorities above cited.

5. Applying these rules, as far as applicable, to the evidence set out in the record, we will proceed to determine whether the court below correctly allowed the credit to the administrator of the note in controversy. The administrator is entitled to retain assets, in payment of a debt due him from his intestate, or to a credit for the amount of such debt, on a settlement of his administration.—*Parker's Heirs v. Parker's Adm'r*, 33 Ala. 459; *Kinnebrew's Distributees v. Kinnebrew's Adm'rs*, 35 Ala. 628. And he is entitled to such credit, upon proof that would authorize a recovery in an action on the debt against the intestate, if he were alive. *Gaunt and Wife v. Tucker's Ex'rs*, 18 Ala. 27.

6. In this case, the plea of *non est factum* was interposed by one of the distributees; and although such an issue, where the evidence is so conflicting as in this case, is one which should be tried by a jury, yet there is no statute, now in existence, which would authorize the court below to empanel a jury to try the same, as was done in the cases of *Willis v. Willis*, 9 Ala. 330, and *Reynolds v. Reynolds*, 11 Ala. Rep. 1022.

7. We must, therefore, pass upon the law and the facts, as an appellate court is often required to do, in probate and equity court causes, and as those courts are authorized by law to do. But we have not the advantages, in forming a judgment upon the testimony, which the probate court

had; for the witnesses are usually examined *ore tenus*, in the presence of the court, and it can apply the same tests to their testimony which a jury is authorized by law to do. They can look to the demeanor of a witness on the stand, and perceive whether he has any inclination or bias in favor of either party; observe and judge of his powers of discernment, memory, and description, and determine therefrom the just weight and value of his testimony. In making up a conclusion upon written testimony, the court and jury are both deprived of the benefit of these tests, to the extent afforded by an examination of the witnesses in the presence of the court and jury. In a case where the testimony is conflicting, or variant, as in this case, these tests are of great importance; and the judgment of a court, or the verdict of a jury, rendered in such a case, should not be disturbed, except on the clearest conviction of an erroneous decision. In other words, the judgment of the court below should not be set aside, unless a court would be authorized, upon established principles, to set aside the verdict of a jury, where the issue had been tried by them.

Keeping in view the rules and principles hereinbefore sanctioned, we will proceed to the consideration of the testimony, and make an application of the law to it, in order to arrive at a correct judgment upon the merits of this cause. The appellee introduced and examined five witnesses, and the appellants four; and the original note, the subject of controversy, attached to the transcript by the judge of probate under the 18th rule, (Revised Code, p. 817,) "will be considered by this court in connection with the transcript of the proceedings."

8. In a trial of an issue, on a plea of *non est factum*, as it is called, the burden of proof is on the plaintiff (Code, § 2279); and in this case, the appellee occupies the position of the plaintiff in a suit in a court of common law. A mere preponderance of evidence does not necessarily entitle a party to a verdict, upon whom is cast the burden of proof.—27 Ala. 272; *Jarrett v. Lillie*, 39 Ala. 400. The jury should be satisfied, after considering all the evidence before them, and the law given to them by the court as applicable thereto, that the party upon whom the burden of

proof lies, is entitled to a verdict on the issue submitted to them. And in this case, the court should be governed by the same rule.

Three of the witnesses of appellee testify as to the question of the handwriting of the deceased. Neither of them speaks positively as to his opinion of the genuineness of the signature to the note. The first says, on examination in chief, that he is well acquainted with the handwriting of deceased, and *believes* the signature to be the handwriting of deceased; and on cross-examination says, that he can not say positively that the signature is the handwriting of deceased, "but if not, it is the best counterfeit he ever saw." He does not testify how many counterfeits he had ever seen, or that he had any skill in detecting them. The second witness says, that he had seen the signature of deceased once, and had not seen his handwriting for a long time since, and did not know that he was acquainted with the handwriting of the deceased; but that the signature to the note looked like the signature to the note witness had seen; and on cross-examination, that he could not say the signature to the note was in the handwriting of the deceased, as it had been a long time since he had noticed the handwriting of deceased. The last witness testified, that he had seen the deceased sign his name several years ago; and after saying that he believed the signature to be the handwriting of deceased, said on cross-examination, that he "does not now believe he has any distinct opinion, as to whether the signature to the note is in the handwriting of deceased or not." Two witnesses prove circumstances showing, or tending to show, that the appellee had a note against the decedent in 1861. But their evidence fails to identify this note as the one, to our satisfaction. One describes a note, with an endorsement at the bottom of the back; and though this has such an one, yet it was made in 1866, at the same time the one near the middle of the back was made; and the witness could neither read nor write, and only saw it once casually in 1861; but remembers the endorsement at the bottom and top of the back of the note. This may have been a very honest mistake; but it shows that his memory of things he saw five or six years ago is not alto-

gether reliable. Nor does the evidence of the other identify this as the note which was spoken of in 1861 by the parties.

On the other hand, the four witnesses introduced by appellants show that they were more familiar with the decedent's handwriting than the witnesses of the appellee, excepting the witness Burns; and two of them are very positive, that the signature is not in the handwriting of the deceased; and the other two give their belief very clearly to the same effect; and all assign reasons or grounds for their conclusions.

We are satisfied that, upon the evidence, testing it by legal rules applicable to such a contrariety or conflict of opinion and circumstances, that the appellee did not make good the affirmative of the issue. Besides all this, there are circumstances which might be looked to as confirmatory of the conclusion to which we have come; such as—1st, the absence of any evidence to prove any transactions between the parties, which would establish the consideration of the note; 2d, that the note was not seen by any other person from 1859, until it was filed in court, in 1866, except by the witness who saw a note in 1861, like the one in controversy, in the possession of appellee. These are circumstances, slight in themselves, against the authenticity of the note; but the consideration, if proven, would be material to the issue, in a case where the evidence is so conflicting as in this case; and it may, perhaps, be proved on another trial.

We have laid down rules and principles in this opinion, which go beyond the necessities of a decision of the case upon the present record; but only such as the evidence indicates may aid the court below, on another trial, in making up a decision upon the admissibility of evidence and the merits of the cause.

The clerk of this court will deliver to the respective parties, or their attorneys, the original exhibits attached to the transcript, respectively introduced by them; taking a copy of the note, with the endorsements thereon, and attaching it in the place of the original.

The decree is reversed, and the cause remanded.

MOBILE & OHIO RAILROAD CO. *vs.* JARBOE.

[ACTION AGAINST RAILROAD COMPANY, AS COMMON CARRIER, FOR LOSS OF GOODS
BY NEGLIGENCE.]

1. *Liability of common carrier for negligence.*—In a bill of lading, or receipt for freight, given by a railroad company, an exception in these words, “taken at the owner’s risk,” only exempts the company from the liability as an insurer which is by law imposed on a common carrier, but does not change the character of the employment; nor does it relieve the company, when sued as a common carrier for the loss of the goods, from the *onus* of bringing itself within the exception, by making out at least a *prima-facie* showing that the loss was not caused by negligence; and proof of the facts, that the contract was made during the late war, that the railroad was at that time frequently used by the military authorities in the transportation of troops and supplies, and that, in consequence of the condition of the country, there was a great want of safety and certainty in the transportation of freights over the road, does not make out such *prima-facie* case.

APPEAL from the City Court of Mobile.

Tried before the Hon. H. CHAMBERLAIN.

THIS action was brought by William C. Jarboe, as surviving partner of the late firm of Jarboe & Miller, to recover two hundred and ninety-five dollars, “as damages, for the failure to deliver certain goods, to-wit, three boxes of tobacco, received by said defendant as a common carrier, to be delivered to said Miller, at Mobile, for a reward; which said defendant failed to do.” The action was commenced on the 18th June, 1863; and the trial was had, on issue joined on the plea of not guilty, at the January term, 1867. On the trial, as the bill of exceptions states, the plaintiff read in evidence the bill of lading, or receipt, given by the defendant’s agent at Okalona, Mississippi, at which place the goods were received for transportation. This receipt was dated the 10th July, 1862; described the goods as “forty-three boxes tobacco, weight 4,846 lbs.,” contained an exception, or stipulation, in these words: “Taken at

owner's risk;" and on it was endorsed a memorandum, signed by John F. Rawls, who was the defendant's receiving agent at Mobile, dated the 14th July, 1862, which stated that "three packages of the within tobacco did not come to hand." "The plaintiff then introduced said Rawls as a witness, who testified that, at that time, he was in the defendant's employment at Mobile, and had charge of the receipt and delivery of freight arriving by the trains; that the shipment of tobacco had arrived in Mobile at the time of his endorsement on the said receipt—that is to say, forty boxes had arrived, but the others had not reached Mobile; that he did not know the reason why, and could give no account of the three which were missing, and knew nothing as to them; that he could not remember whether any freight was paid by the plaintiff, but supposed it was paid, from the fact that he delivered the forty boxes; nor could he remember how much freight, if any, was paid by the plaintiff. The plaintiff then proved the value of his tobacco, and there rested his case. Said Rawls stated, on cross-examination, that at the time of this transaction, which was during the war, the country was in the possession of large bodies of Confederate troops, who were passing backwards and forwards; that the defendant's road was frequently used by the military authorities, in carrying troops and supplies, the battle of Shiloh having been fought in April, 1862; that said railroad company had met with heavy losses, by stealage from the freight cars, and by interruption and devastation consequent upon the existence of a state of war, and therefore inserted in their contracts to carry goods or freight the words, 'at the owner's risk;' that the plaintiff was a sutler for the army, and the tobacco was part of his 'sutler's stores.'

"Upon the foregoing evidence, the court instructed the jury, that the duty of a common carrier was to transport goods safely, and he could be excused from doing so only by the act of God, or the public enemy; that the parties might stipulate for terms and conditions, limiting the responsibility of the carrier, and such special agreement would be lawful; that the special agreement, however, in the receipt produced in this case, did not change the posi-

tion of the common carrier, except within the particular exception agreed on; that the exception was not a discharge from all responsibility; that it was the duty of the carrier to bring himself within the terms of the exception; that the carrier must account for the goods, by showing that the loss was by cause of, and within the terms of the exception; that the burden of showing how the loss occurred was on the carrier; that he must show that due care and diligence were used for the safe transportation and delivery of the goods; that, to hold the defendant liable, the burden of proving negligence was not on the plaintiff, but the fact of non-delivery of the goods was sufficient to charge the defendant, as a common carrier, in the absence of proof by the defendant of ordinary care and diligence at least, and as to how the loss occurred, or might have occurred, so as to show that the defendant was within the terms of the exception; and that the defendant would be chargeable as a common carrier, as to all except the matter of the exception.

“The defendant requested the court to instruct the jury—1st, that the defendant, under the contract given in evidence by the plaintiff, is not chargeable with the duties annexed by law to the obligation of a common carrier; 2d, that the obligation of the defendant, under said contract, would be that of a bailee for hire; 3d, that the defendant, under the contract in writing shown by the plaintiff, was not responsible for the negligence of the employees of the railroad company; 4th, that if the jury believe, from the evidence, that the state of the country, at the time this contract was made, was such as to make it impossible for the railroad company to carry freight safely, and that said company used all reasonable efforts to carry on the business of carrying, then, under the contract in evidence, in the absence of any evidence of negligence, (if they believe none was shown,) the defendant would not be liable, by proof of the mere fact that three boxes did not arrive at the point of destination; 5th, that the defendant is not chargeable, under the contract shown in evidence, unless some negligence, or wrongful act of the defendant, is shown; 6th, that, to charge the defendant under this contract, proof of

negligence must be made by the plaintiff; 7th, that, to charge the defendant under this contract, the burden of proving negligence lies on the plaintiff, and not on the defendant to show care and diligence; 8th, that if the cause of the non-arrival of the goods was uncertain and unknown, and it was uncertain whether there was negligence or not, then, in the absence of any proof of negligence, they should find for the defendant; 9th, that, the defendant being charged as a common carrier, if the jury believe that the goods were shipped on the terms of the written contract, then the complaint is not sustained, and the plaintiff can not recover on the evidence, as the evidence would be variant from the complaint; 10th, that the question of negligence by employees of the railroad company, under the contract, does not arise under the complaint, but only of negligence (if any) of the corporation itself."

"The court refused each of the charges asked; and to each refusal, as well as to the affirmative charge given by the court, the defendant excepted."

The charge given, and the refusal of the several charges asked, are now assigned as error.

P. HAMILTON, for the appellant.

W. C. EASTON, *contra*.

JUDGE, J.—The exception inserted in the contract for the transportation of the freight, in the present case, viz., "*taken at the owner's risk*," did not change the character of the employment. Appellant remained, notwithstanding the reception of the goods under the contract, a common carrier, with his liability, as such, diminished only to the extent of the exception.—*Steele v. Burgess & Townsend*, 37 Ala. 253-4, and cases there cited.

A common carrier may legally contract for exemption from that responsibility imposed by the common law, by which he becomes an insurer. But, on grounds of public policy, he can not go farther than this, in the limitation of his liability by special contract.—*Mobile & Ohio R. R. Co. v. Hopkins*, decided at the present term.

The construction of the contract in the present case,

therefore, must be, that the goods received were "taken at the owner's risk," in so far as the liability of appellant as an *insurer* was concerned.

A portion of the goods not having been delivered at the place of destination, the loss was not brought within the exception therein contained, unless it appeared to have occurred without negligence on the part of appellant. The rule, as we have settled it in such case, is, that inasmuch as "it is for the carrier to bring himself within the exception, he must make at least a *prima-facie* showing that the injury was not caused by his neglect."—*Steele v. Burgess & Townsend*, 37 Ala. 253, and authorities there cited.

This appellant failed to do. That the transaction occurred during the war, and appellant's road about the time was frequently used by the military authorities in the transportation of Confederate troops and supplies, and that in consequence of the condition of the country, there was a great want of safety and certainty in the transportation of freights over the road, furnished good reasons for the insertion of the exception contained in the contract, but did not relieve appellant from that care and diligence, which, notwithstanding the exception, were elements of the contract, nor from the *onus* of making at least a *prima-facie* showing that the loss was not caused by its neglect. It did not even appear on the trial, that the missing boxes were ever started for their place of destination, after having been received by appellant.

The evidence that appellee was "a sutler for the army, and that the lost tobacco was a part of his sutler's stores," is no evidence that "*his* sutler's stores" belonged to the Confederate States Government; nor can any such conclusion be legitimately drawn from this evidence.

It results, from what we have said, that there was no error in the charge given by the court, nor in either refusal of the court to charge as requested; and the judgment is consequently affirmed.

PERKINS *vs.* LEWIS ET AL.

[BILL IN EQUITY, BY LEGATEES, AGAINST EXECUTOR'S SURETY.]

1. *Devise to executors, in trust to sell and divide proceeds, creates personal trust, and not official duty.*—A devise to executors, “hereinafter named, for the use and benefit of” specified legatees, in trust to sell, with special directions as to the terms of sale, and to divide the proceeds of sale, when collected, among the legatees, creates in the executors a personal trust only, and does not impose on them an official or executorial duty; consequently, the sureties on their official bond as executors are not responsible for their failure to pay over the proceeds of sale according to the directions of the will.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. J. Q. LOOMIS.

THE bill in this case was filed, in November, 1866, by William F. and Mary A. Lewis, Jacob and Margaret Dansby, and Bradley Ridgway, against William Perkins, as the sole surviving surety on the official bond of Moses Hubbard and John M. Bell, as executors of the last will and testament of Mrs. Rebecca Bell, deceased; and sought to charge the defendant, as such surety, on account of the default of the said executors, in failing to pay over to the complainants their respective portions of the proceeds of sale of certain lands, as hereinafter more particularly stated. The testatrix died, in said county of Greene, in 1843, after having duly executed her last will and testament, which was there admitted to probate, on the 14th October, 1843, and of which said Moses Hubbard and John M. Bell were therein appointed the executors. The second item of the said will, which is the only item involved in the controversy in this case, was in the following words:

“I desire and direct, that a lot of twenty acres be laid off, so as to include my present residence and the strip left between the lands of said Clark and the aforesaid lot be-

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queathed to my daughter Martha, and so as to include five acres of my timbered land. This lot I hereby devise and bequeath to my executors, hereinafter named, for the use and benefit of my beloved daughter, Agnes Pickens, and of my beloved grandchildren, Mary Ridgway, Bradley Ridgway, and Margaret Ridgway, children of my deceased daughter, Mary Ridgway; the said Agnes to have one moiety, and the said children of my daughter Mary to have the other moiety. This lot of land is to be sold by my executors, hereinafter named, as soon as the same can be sold for a reasonable and fair price, and conveyed by them to the purchaser. If sold on credit, in addition to taking good personal security, my executors are to secure the payment of the purchase-money by a mortgage on the premises, with a power of sale. When said lot is sold, and the money collected, or if (and when) any portion of it is collected, it is to be divided into two shares; one of which is to be paid over to my daughter, Agnes Pickens, to belong absolutely to her, and to do as she pleases with the same; and the other share is to be held by my son, John M. Bell, as hereinafter directed, for the use and benefit of my said three grandchildren, children of my deceased daughter, Mary Ridgway."

The executors named in the will qualified, and gave bond, with William Perkins, William A. Bell, and Asa White, as their sureties. The bond was dated the 14th October, 1843, and was conditioned that the said John M. Bell and Moses Hubbard "shall well and truly perform all the duties which are, or may be, required of them as such executors." The executors laid off the lot according to the directions of the will, and sold it, in March, 1845; and in December, 1852, Moses Hubbard, then the sole surviving executor, collected the notes which had been given for the purchase-money, and entered satisfaction of the mortgage. Said Hubbard died in May, 1861, insolvent, having never paid over to the complainants their moiety of the proceeds of sale. White and William A. Bell both died, insolvent, before the filing of the bill in this case; and the complainants prayed an account against Perkins, as the sole surviving surety, and a money decree for whatever balance might be ascertained

to be due to them arising from the sale of the land. The defendant demurred to the bill, and assigned the following (with other) causes of demurrer: "1st, that the failure of said Hubbard to pay over said sum of money to said complainants is no breach of the bond given by him and said John M. Bell, as executors of said Rebecca Bell, for which this defendant, as one of their sureties on said bond, can be held liable in this suit; 2d, that, on the facts stated in said bill, this defendant is not bound, as one of the sureties of said executors on their said bond, to account for the said legacy to the complainants, or either of them." At the December term, 1866, the chancellor rendered a decree for the complainants, "by consent, but without prejudice to the defendant's demurrer," and ordered the master to state an account between the parties; and on the coming in and confirmation of the master's report, at the June term, 1867, he rendered a final decree in favor of the complainants, for the several amounts ascertained to be due to them respectively. The chancellor's decree, and his failure to sustain the demurrer to the bill, are now assigned as error.

W. P. WEBB, and MORGAN & JOLLEY, for appellant.—

1. The devisees took personally, as trustees, and not officially, as executors. If they had taken in their official capacity, as executors, the rights, powers, and duties of each, in relation to the subject of the devise, would have been precisely the same; yet the devise makes John M. Bell the legal custodian and trustee of one half the fund arising from the sale, to the entire exclusion of his co-executor. Again, if they had taken as executors, and not as trustees, an administrator with the will annexed would have had precisely the same power to execute the trust; yet it is evident that such administrator would have had no power whatever over the land, unless a sale of it was necessary to pay debts. The following authorities show the proper construction and effect of the devise: *Judson v. Gibbons*, 5 Wendell, 227; *Dominick v. Michael*, 4 Sandford's (N. Y.) S. C. R. 400; *Ross v. Barclay*, 18 Penn. St. (6 Har.) R. 179; *Lessee of Lewis v. McFarland*, 9 Cranch, 151; *Leavens v. Butler*,

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8 Porter, 389-402; *Hitchcock's Heirs v. U. S. Bank of Penn.*, 7 Ala. 437; 10 Gill & John. 27.

2. If the executors took as trustees only, and not in their official capacity, a surety on their official bond is not responsible for any breach of trust on their part.—4 Ala. 682; *Perkins v. Moore*, 16 Ala. 14; 5 Wendell, 227; 21 Wendell, 430; 25 Wendell, 231.

BLISS & SNEDICOR, and W. COLEMAN, *contra*.—The devise vested in the executors officially, and not personally. They would have had no power over the land, and could not have interfered with it for any purpose whatever, if they had not first qualified as executors. Their bond was conditioned as the statute then required, and bound their sureties for any *devastavit* committed by them in relation to the land, as well as for any other default on their part.—*Speed's Executors v. Nelson*, 8 B. Monroe, 503; *Swope v. Chambers*, 2 Grattan, 319; 1 Marshall, 491; *Davis v. Davis*, 10 Ala. 299; *Perkins v. Moore*, 16 Ala. 15; Clay's Digest, 221, § 3; *ib.* 229, § 44.

BYRD, J.—The decree settling the rights of the parties was rendered upon consent, without prejudice to the demurrer of appellant. This relieves us from reviewing any questions, except those raised by the demurrer. The point upon which the case turns is as to the liability of appellant, as surety on the bond of the executors of the will of Rebecca Bell, deceased; and this involves the construction of the second clause of the will, which is as follows: [See the item quoted above.] It is contended on the one hand, that the devise to the executors, with a power of sale, imposed upon them the performance of the trust as executors, and that their failure in this respect made them and their sureties liable for such failure. The other side insists, that the devise to the executors was merely a designation of persons who were to take the legal estate to the land, in trust for the uses declared, and imposed a personal trust, and not an official one; and that therefore their sureties are not liable for any default of their principals in the per-

formance of the duties prescribed by the above recited clause of the will.

Our statutes, at the time the bond was given, required the judge of probate to take a bond, in double the amount of the value of the real and personal estate, and subjected the land to the payment of the debts of the decedent. The executors, under the statute, could hold the land for the payment of debts ; and upon a sale for that purpose, under an order of court, they and their sureties might be liable for the proper application of the proceeds. But would the latter be responsible, for any loss occurring from the acts or omissions of the former, in the execution of the trusts declared in the second clause of the will? I will proceed to notice some of the adjudications touching this interesting question.

In the case of *Judson v. Gibbons*, (5 Wendell, 228,) it appears that the will devised real and personal property to the executors, *upon trust* to take care and manage the same, and invest the income for the best interests of the estate, until the youngest child became of full age, and then divide the same among the children of the testator ; and as to the shares of his daughters, upon further trust during their lives. The court held, that the estate thus devised, “at the testator’s death, belonged to the executors named as *trustees*, and not as executors. The executors, indeed, were entitled to it in preference, so far as it was necessary for the payment of debts ; but the offices of executor and trustee are not necessarily blended.”

In *Conklin v. Egerton’s Adm’r*, (21 Wendell, 432,) the will empowered the executors named to sell and dispose of real estate, for the most money that could be gotten for the same, and to execute conveyances in fee simple, and to divide the money arising from the sale among the sisters, nephews, and nieces of the testator ; the land having been devised to them in a previous clause of the will. The question arose, whether an administrator *cum testamento annexo*, after the death of the executor, was authorized to execute the power conferred upon the executor, under a provision of a statute which declared, that “the administrators of such will shall have the rights and powers, and

be subject to the same duties, as if they had been named executors in such will." The court held, that they were not, on the ground that the power, and its exercise, was a personal trust, and was not attached to the executorial office; and that the statute only imposed such duties upon administrators as the will or the law imposed upon the executors as such. Mr. Justice Cowen, delivering the opinion of the court, reviews at some length, and with his usual accuracy and research, the authorities touching this subject. In speaking of the power of the executor under the will in that case, as to the land and personal property devised to the sisters, nephews, and nieces of the testator, he says: "As the depositor and distributor of a common fund, arising from the avails of real and personal estate in his hands at the same time, or, as he really is, the mere instrument of a devise entirely distinct from the personalty, his acts, in respect to the land, were not, and could not be, performed in his capacity as executor; *quoad hoc*, he was an agent, acting under a private power of attorney. It is the same thing as if the testator had drawn up separate wills, the one of his personalty, naming Hart as executor, and the other of his land, naming him as the man to make a sale." He assigns a reason why the administrator with the will annexed is not authorized by law to execute a power to sell land, and perform the trusts conferred on an executor by the will, in the following language: "My opinion is, both upon the words of the section (of the statute) in question, and its intention as derivable from its history, its reason, and context, that the legislature did not mean to confer on an administrator with the will annexed any greater power than they have provided that he shall give due security to perform. This, in no part of the revised system of administration, extends beyond the personal estate, or assets arising from a sale of real estate for the payment of debts."

The statute law of this State requires the judge of probate to take bond, in a penalty equal, at least, to double the estimated value of the real and personal property of the estate, conditioned to perform all the duties which are, or may be, required by law as such executor or administrator.

This was substantially the law when the bond was given in this case, and its condition is in conformity thereto. Under the provisions of the statute law of this State, I have no doubt that an executor would be liable for the proceeds of a sale of lands, sold under a power given by the will, for the purpose of paying debts, or sold by an order of court for the same purpose, although the land is devised in trust to him for other purposes. This is entirely consistent with the view taken in the case cited from 21 Wendell. The fact that the statute requires an executor to give bond in double the amount of the real, as well as the personal property, does not necessarily make the executor as such, and his sureties, responsible for the faithful execution of personal trusts imposed on the former by the will. And the main question, therefore, in this case, is, whether the devise of the lot of land to the executors, for the use and benefit of Mrs. Pickens and the grand children of the testator, to be sold by the executors, and conveyed by them to the purchaser, and the proceeds of the sale, when collected, to be divided as directed, constitutes a trust *extraordinary*, personal to them, or is one that is comprehended within the ordinary duties of an executor or personal representative.

The case last cited came again before the court of errors, and the same questions were again considered.—*Vide* 25 Wendell, 224.

In *Holmes v. Cock*, (2 Barb. Ch. 426,) it appears that the executor had fully administered the personal estate, and the only property unadministered was real estate, which was devised to be sold after the death of the widow, who was still living, and the proceeds of sale to be distributed among the residuary devisees. The surrogate had ruled the executor to give security for the faithful discharge of his trust as executor, and he appealed. Chancellor Walworth held, under the statutes of New York, that "the statute authorizing the executor to bring the proceeds of real estate, sold by virtue of a power contained in the will, into the surrogate's office for distribution, is only for the benefit or protection of the executor, and it does not require the executor to place such proceeds in the surrogate's hands ;"

and further, that the bond required by law "is a bond for the benefit of every person interested in the estate;" and that "the whole amount recovered against the sureties would have to be distributed among all those who had suffered by the executor's mal-administration of the funds."

There was no statute in this State, in 1843, when the bond was given upon which this suit is founded, similar to the one referred to by Chancellor Walworth. Yet, in a case where a will merely empowered an executor to sell lands for distribution among certain persons, it may be that, under the law at the time the bond in this case was given, the sureties would be responsible for any default of the executor in the administration of the proceeds of the sale, or to creditors for any mal-administration thereof.

In the case of *Dominick v. Michael*, (4 Sandf. 374—399,) where the words of the will were as follows: "I authorize my executors, *hereinafter named*, to sell and dispose of any part of my real estate according to their discretion, either at public or private sale, and to give sufficient deeds or conveyances of the same in fee simple to the purchaser or purchasers thereof," the court held that "the power thus to divide or sell may indeed be given to executors, but in its execution they act not at all as executors, but wholly as devisees in trust; and it is therefore no more transmissible to an administrator with the will annexed, than had it been given to trustees, having no other duty to perform under the provisions of the will." * * * "And as the proceeds of the land, when sold, are to be distributed amongst those to whom the lands themselves are devised, it is as devisees and owners that they receive them, and their respective shares can with no more propriety be denominated legacies than had the sale been made by themselves instead of the executors."—1 Jacob & Walker, 189; 4 Mad. 44. And Mr. Justice Duer, in delivering the opinion of the court, which is distinguished for its clearness and profound research, further said, in speaking of the power given to an executor to sell lands: "But, where it is given to executors by their individual names, or, as in the present will, to executors *hereinafter named*, it is certain that it vests in all who are thus named, whether they prove the will or not, by

force of the will itself; and that a devise of the power is then construed to take effect precisely in the same manner as a devise of the legal estate." And the court further held, that if a single proposition may be regarded as established beyond controversy, it is, "that an express power to dispose of lands, no matter for what purpose, or by what instrument it is created, is limited to the persons or person to whom it is given, and can never be exercised by the representatives, real or personal, unless they are expressly or impliedly designated as donees of the power." Consequently, the devise of such a power does not attach to the official or executorial character, but to the person of the executor *as a trustee*. The power is not transmissible with the office of personal representative of the estate of the testator. And whether the executor could execute such a power after his resignation of the office of executor, and the transfer of the administration of the estate to another, it is not necessary now to express an opinion. The decision in the case of *Dominick v. Michael* was made with reference to the same statute upon which the decision was made in the case of *Conklin v. Egerton's Adm'r, supra*, and other statutory enactments which modified the doctrine of the common law. The statute law of this State, in 1843, did not affect that doctrine to any greater extent than the statutes of New York referred to in the foregoing cases.

In *Newcombe, Judge, v. Stebbins et al.*, (9 Metc. 540,) the clause of the will construed was as follows: "I give and bequeath to my son William, to hold to him and his heirs forever, all the rest and residue of my real and personal estate, wheresoever situated, including therein all the real estate bequeathed to my wife, subject to the following liens, payments, and charges: *first*, the payment of all debts I owe at my decease, and all funeral charges, and the erection of a suitable monument at my grave; *second*, to pay to my three daughters, Louisa, Lucy, and Mary, each, and to Maria, the wife of Josiah Brown, of Hatfield, the sum of seventy dollars, provided he cancels a claim of nearly that amount he holds against my son Lansford, which I gave encouragement to see paid; the aforesaid liens and payments to be made, one-half in two years, and one-half in

three years from my decease, with interest from that event. I hereby nominate and appoint my son, William Stebbins, executor of this my last will and testament." The executor, who was the same person as the devisee, entered upon the real estate, and received the rents and profits for two years, in notes made payable to him *as executor*. The court, in the opinion delivered by Hubbard, J., speaking of the liability of the executor to account to the creditors for the rents of the real estate, said: "He would only be liable in equity, as a trustee, and could not be required, by the mere force of such liability, to account as executor;" and further, in answer to the position taken by counsel that, being responsible as trustee, it would avoid circuity of action to charge him as executor, the court said, "By sustaining such a position, his bondsmen would be held accountable for rents and profits accruing after the decease of the testator, and for years perhaps; a responsibility not contemplated nor covered by the bond." One of the conditions of the bond seems from the report of the case to have been "to administer according to law." And there seems to be no substantial distinction between the effect of such a condition, and one to "perform all the duties which are or may be required of them as such executors," which is the condition of the bond in the case in hand.—See also the case of *Judge v. Claggett*, 36 N. H. 381.

In *Ross v. Barclay*, (18 Penn. 179,) there was a devise of lands to an executor upon trust, and Gibson, C. J., in delivering the opinion of the court, said: "On the foot of the maxim that, when different rights meet in the same person, they are to be treated as if they were different persons, courts of equity, recognizing the union of executor and trustee in the same individual, *reddendo singula singulis*, have considered real estate, directed to be sold for payment of debts, as equitable assets, and consequently as the subject of a trust. * * * * With us, land has perhaps always been legal assets; and when a trust is created, to bring it into a course of administration, it is proper that an administrator should succeed to the execution of it; but the statute was not intended for a trust unconnected with an executor's ordinary duties." The statute referred to

did not empower an administrator with the will annexed to execute a trust of land confided to an executor, by title or by name, for any other purpose than to sell for the payment of debts. And the Chief-Justice further said, that by the act relating to executors and administrators, they "may execute a power to sell, in order to bring the land into a course of administration, but not to execute a trust for a collateral purpose; for instance, to manage the property and invest the proceeds of accumulation; or to maintain the widow and children; or to turn the land into money for the convenience of partition."—See, also, *Aston Estate*, (5 Whart. 228,) which seems to be in point from the note made from it in the U. S. Digest, but I have been unable to obtain the report itself.

In *Hall v. Cushing*, (19 Pick. 395,) it was held, that an executor and his sureties were liable for the unfaithful administration in the execution of a power conferred by the will to invest the proceeds of the sale of personal property; and the court say: "And generally, the executor is bound to comply with the directions of the will, so far as they may relate to the administration of the estate, and may be beneficial to the assets while in his possession for that purpose; and a neglect to do so would be an unfaithful administration of the estate, for which he and his sureties in the bond would be responsible."

The case of *Prior, ex'r, v. Talbot et al.*, (10 Cush. 1,) holds that an executor, who is also constituted a trustee, is responsible as executor until he gives a bond as trustee; and the case of *Dorr v. Wainwright et al.*, (13 Pick. 328,) is the only authority referred to; and in that case there was a bequest of *personal* property, and the court say: "Whatever questions might arise upon the effect of this devise of the real estate, they are not now under consideration, and the only question is, what is the effect of this clause in the will as a bequest of personal property." And further, "that as the will is a law to the executor, and his duty is to administer, that is, to apply, manage, and dispose of the estate, according to the will, the duties of executors, and the obligation of their sureties, may be as various, as the infinitely varying forms in which wills can be legally made;"

and "that any default of the executor in the discharge of his trusts, and the execution of his official duties, whether such default be in failing to carry into effect the particular directions of the will, or in the non-performance of the general duties prescribed by law, is an express breach of the bond, the condition of which is to administer the estate according to the will." This language must be construed with reference to the question before the court; which was as to the liability of an executor and his sureties for an unfaithful administration of the *personal* estate, and the trusts relating thereto created by the will.

In the case of *Barker, ex'r, v. May et al.*, (9 Bar. & Cress. 489,) it was held, that a devise of lands to executors to be sold, makes the money arising from the sale equitable, and not legal assets; and that a legatee could not sustain a proceeding in the ecclesiastical court, to recover a legacy out of such assets.

In *Deering v. Adams*, (37 Maine, 264,) the court say: "The bonds given by executors will not protect the estate against the non-feasance or mis-feasance of the trustees, though they be the same individuals."

In *Leavitt v. Wooster*, (14 N. H. 550,) there was a devise of real and personal estate to the widow of testator during her life, provided she should see his daughter had a decent support, and should pay certain legacies. The widow was appointed sole executrix of the will. Her bond was in the common form. The court held, that "if another person had been the trustee, the sureties of the executrix would not have been liable for the performance of the trust. Where the duties of each character are distinguishable, why should the sureties for the performance of the ordinary duties of an executrix be holden for the performance of duties of a different character. And our opinion is, that this is not a trust which the executrix is bound to perform, in order to administer the estate according to the condition of the bond, and that the sureties are not liable."—Also see *Gregg v. Carrier*, 36 N. H. 200.

In *Mason Co. v. Lee*, (1 Mon. Ky. R. 247,) the court, in speaking of lands devised by a will to the executor to be sold, said: "Whether they be simply directed to be sold by

him, or are devised to him to be sold for the payment of debts and legacies, they are considered not as legal, but as equitable assets, and can only be reached in his hands as executor, in a court of equity, and not in a court of law." 1 Marsh. 381; *Monroe's Executrix v. Wilson*, 6 Mon. 122; *Helm et al. v. Darby's Adm'r*, 3 Dana, 166; *Clouda's Ex'r v. Adams*, 4 ib. 603.

In the case of *Speed's Ex'rs v. Nelson's Ex'rs*, (9 B. Mon. 499,) the court held, that the money arising from the sale of lands, devised to executors for the payment of debts, is not legal assets in their hands, but is a trust fund in their hands, which a court of equity *alone* can take jurisdiction to enforce its proper administration; and further held, under the statutes of Kentucky and the bond required to be given by an executor, that "though the proceeds of land, if charged with the payment of debts, constituted equitable assets in the hands of the executor, the sureties were not liable therefor." It *may be* that, under the statutes of this State in force in 1843, and the condition of the bond of appellant, this court might hold, that the sureties might be held liable for money arising from the sale of land, sold by an executor, under a power conferred by the will, for the payment of debts; yet the case last cited may be considered an authority, at least, in the reasoning employed by the court, to establish the proposition, that the sureties on the bond of an executor, such as the one in this case, are not liable for the default of the executor in the administration of trusts imposed by the will, which are not included within the ordinary duties of an executor, and which are personal, and not *executorial* trusts.

In *Sims v. Lively*, (14 B. Mon. 433,) the devise was to Hardin and Preston Finley, of land and personalty, imposing certain duties and trusts; and in a subsequent clause of the will, they were appointed executors of the will. The persons in whose favor the trusts were created sought to make them and their sureties liable for the default of the executors in the execution of the trusts, and the court held, that "although the devisees are also named as executors, and qualified as such, yet, as their rights and duties in these two capacities are as different, as if the persons to whom

they pertain were different, so ought their liabilities to be. Their delinquency is not as executors, but as devisees, and, as they have committed no breach of duty as executors, there is no ground for holding their sureties liable for their failure as devisees."

This case is an authority in point, if the case before reviewed, which holds that there is no distinction between a devise to executors by name or by title, (as to "executors hereinafter named,") is sound law. In the case in hand, the devise is "to my executors *hereinafter named*, for the use and benefit" of the appellees.

The case of *Almond et Ux. v. Mason's Adm'r et al.*, (9 Gratt. Va. R. 700,) was a bequest of personal property, to be sold by the executors, and the proceeds divided among testator's children. The executors sold, but failed to divide. It was held, that the sureties were liable for the failure to pay over the proceeds. Such is the head-note to the case, but from the opinion of the court it seems that the executors did not sell, but an administrator *de bonis non* with the will annexed took possession of the property and sold it; and it was held that the sureties on his official bond were liable, "it being the duty of the administrator to pay over the proceeds arising from the sale of such property amongst the residuary legatees, in the mode prescribed by the will; and by the condition of their bond they bound themselves that he should pay and deliver all the legacy contained and specified in the will, as far as the goods, chattels and credits would extend." I suppose that by some statute of that State, an administrator with the will annexed was authorized to make sales, where the will conferred the power to sell the personalty upon the executor. It is assumed that he had such authority, and that he acted "in virtue of his office, and in performance of the duty imposed upon him by his office and the will of the testator."

In *Doe, ex dem., v. McFarland*, (9 Cranch, 152,) it appears that the testator devised his land to his "executors *hereinafter named*, and to the survivors and survivor of such of them as may act, and their heirs, for the purpose of selling as much thereof as will pay all my debts." Marshall, C. J., in delivering the opinion of the court on this clause of the

will, said, speaking of the right of the executor to sue for the land: "In such case, the executor sues as devisee. His right is derived from the will, and the letters testamentary do not give the title. The executors are trustees for the purposes of the will."

This court from an early day held, that an executor could not maintain a suit, until the will was probated, and he qualified as provided by law.—*Cleveland's Ex'rs v. Chandler*, 3 Stew. 489; *Gardner v. Gantt*, 19 Ala. 666.

In *Leavens v. Butler et al.*, (8 Por. 380,) this court held, that a power conferred on "executors, or the survivors of them," to sell lands, could be executed by the one who qualified, and that the power was "attached to the office." After holding that an executor can not sue in his representative character, "*without* the jurisdiction of the power by which the letters were granted," the court proceeds thus: "The case would be different, if lands were devised to an executor. There the executor might sue as devisee;" and the case from 9 Cranch, 151, *supra*, is cited alone as authority to sustain this doctrine.

In *Lucas v. Doe, ex dem.*, (4 Ala. 683,) Collier, C. J., delivering the opinion, said: "The powers of an administrator with the will annexed are the same as those which pertain to an executor *as such*, and the question is, whether a devise to sell land is a trust extraordinary, or comes within the appropriate functions of an executor. From what has been said, it would seem that it was the former. This question was largely considered in *Conklin v. Egerton's Adm'r*, 21 Wend. 430. There, as in the case before us, the inquiry was, whether an administrator *cum testamento annexo* could execute a power conferred upon the executor to sell and convey real estate. The conclusion of the court was, that a testament concerned the personal property merely, and though by statute it was allowable to make a will of the realty, it did not follow that the person appointed to execute it would, as to all its provisions, be regarded as an executor. He might be considered a mere *donee of a trust power*, and where he was authorized to sell lands, he would be a trustee, and could not be charged as an executor for anything in relation to the trust."

In the case of the *Heirs and Adm'r of Hitchcock v. The United States Bank*, (7 Ala. 386,) it appears that the devise was as follows: "For the purpose of having my estate properly settled and administered, during the minority of my children, I do hereby appoint my dear wife, Anne, my sole executrix, and I do bequeath and devise the same, both real and personal, to her, in trust, with full powers to sell, either at public or private sale, all or any part thereof, and the proceeds to re-invest and re-sell, at her discretion, for the purpose of paying my debts and legacies, or for a more advantageous investment; and good and sufficient deeds and conveyances to make therefor," and upon other trusts. This court, Ormond, J., delivering the opinion, says: "Can it be doubted, that if she had declined to qualify as executrix, it would not in the slightest degree have affected this devise in trust? See the case of *Judson v. Gibbons*, 5 Wend. 225, where a devise to '*executors hereinafter named*' was held to be a devise to them individually, and not as executors, from the control given to them over the realty, until the youngest child came of age."

In *Perkins v. Moore*, (16 Ala. 10,) which was a case of a *pecuniary bequest* to certain persons, "to be kept and loaned out upon interest by my executors, until either" (referring to the legatees) "may marry or arrive at lawful age," then to be equally divided between them—held, that "the executors will be considered as holding the fund as executors, and not as trustees." And the court uses this language in the opinion: "If, therefore, the executors had been appointed trustees by the will, independent of their character as executors, and they had elected to hold the legacy as trustees, and not as executors, and after this election the fund had been lost, the *sureties* would not have been liable for their default as trustees merely; but that they have elected to hold the fund as trustees, and not as executors, must be made to appear by some plain and unequivocal act; and as there is no act, from which the intention to hold the fund as trustees could be inferred, we could not pronounce that they ever did intend to hold as trustees."

In *Smith's Distributees v. King, adm'r*, (22 Ala. 558,) the court held, that an administrator with the will annexed was

chargeable, as such, for the rents of land, which the will directed to be rented by the executor.

In *Petit's Adm'r v. Petit's Distributees*, (32 Ala. 238,) the court held, that the sureties of a general administration bond, conditioned as required by law, are liable for the waste or misapplication by their principal of money arising from the proceeds of a valid sale of real estate. In this State, by statute, lands are held to be legal assets, when sold for the payment of debts. Hence, sureties on the administration bond are liable for the proceeds of a valid sale of land made by an administrator, when he wastes or misappropriates them.

In *Martin v. Foster's Ex'r*, (28 Ala. 690,) the devise was to "my husband, Benjamin F. Foster, of all the interest which I may have in and to the plantation situated, lying and being in Macon county, now occupied by our negroes and cultivated by my said husband, to him and his heirs forever." All the residue of her estate she bequeathed and devised to him in trust, *first*, for the payment of debts, and then for her three children; and directs that he keep the children with him, and "to use the negroes and other property as we have been accustomed to do;" and out of the profits to expend such sums as he may deem necessary in the education of the children, and when they severally arrive at age, apportion to each one-third of the property vested in him for their benefit. It appears that the husband was appointed executor of the will. The court held, that the executor was chargeable with the value of the use of the land for the two years after the death of the testatrix, as so much in his hands which should have gone towards the extinguishment of her debts; and further held: "Whether, in the after administration of this fund, there will not arise a question of personal trust, which the probate court is incompetent to adjudicate, is a point not now before us."

I shall not notice any other of the numerous adjudications touching this subject.

There seems to be a distinction taken in some of the cases, between a power conferred by the will on an execu-

tor, to sell *land* for the payment of debts or for distribution, and a power to sell *personalty* for the same purposes, as to the authority of an administrator *cum testamento annexo* to execute such power. In the one case it has been held, that he has no authority, and in the other that he has, to execute the power.

There seems also to be a distinction taken in some of the cases, between a devise of a power to executors to sell lands, and a devise of lands to executors, with power to sell for specified purposes. But whether these distinctions, and others similar to them, exist or not, it seems to me that the weight of authority is in favor of the proposition, that a devise *to executors hereinafter named*, of lands, for the use and benefit of others, and specifying the mode of distribution, by directing a sale of them for cash or on a credit, and if on a credit, the mode and measure of security to be taken for the payment of the purchase-money, and then directing how the proceeds are to be divided, is a devise to the executors by name *as trustees*, and not *as executors*. It is a personal devise and trust. And this, although such lands might have been held by them as legal assets for the payment of debts under the statute; but having proceeded to perform the trust imposed by the will, they thereby elected to hold it as trustees, and not as the personal representatives of the estate of the testator. And a beneficiary under the devise, seeking to enforce the trust, can not recover of the surety, on the official bond of the executors, money resulting from the sale of the lands devised to the executors in trust, which they failed to pay over as directed by the will.

The condition of the bond in this case is, to "perform all the duties which are or may be required of them as such executors." This bond does not impose upon the sureties on such bond any liability for the performance of the trusts conferred upon the executors *as trustees*.

However much it may *seem* to comport with what may be termed a sense of natural justice, to hold the sureties liable for the delinquencies of their principals in this case, yet it is clear to us, on long established principles, that it is not in accord with the faithful administration of legal

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justice, to hold them responsible beyond the obligations of their contract, as defined by law at the time it was executed. They have the right to insist and stand on the terms of their contract, and can not be held liable beyond the legal obligations thereof.

The demurrer to the bill sufficiently raised the question of the liability of appellant as surety of the executors; and upon the law, as we understand and apply it, the demurrer should have been sustained.

The decree of the chancellor overruling the demurrer being erroneous, it is reversed, and the cause remanded.

MONTGOMERY & WEST POINT RAILROAD COMPANY *vs.* EDMONDS.

[ACTION AGAINST RAILROAD COMPANY, AS COMMON CARRIER, FOR NEGLIGENCE.]

1. *Sufficiency of complaint.*—In an action against a common carrier, for a failure to deliver freight, a complaint in the form prescribed by the Code, (p. 553,) except that the plaintiff is not the person who is averred to have been the consignee, and which contains no averment of ownership in the plaintiff, is not sufficient on demurrer.
2. *Proof of quantity or value of lost goods; error without injury in admission of evidence prima-facie irrelevant.*—In an action against a railroad company, as a common carrier, to recover the value of several bales of cotton which were destroyed by fire, it is permissible for the plaintiff to prove the weight of all the bales which were contained in his shipment, and of those which were delivered to the consignee, in order to enable the jury to ascertain the weight of the bales which were destroyed; and the admission of evidence showing the weight of the bales which were delivered, without first proving the weight of all the bales, is, at most, error without injury, when the record shows that the other evidence was subsequently adduced.
3. *Proof of value of car burned.*—In such case, the defendant can not be allowed to adduce evidence of the value of the car on which the cotton was laden, and which was also burned with the cotton.
4. *To what witness may testify.*—In such case, a witness for the defendant

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- can not be allowed to testify "that every thing was done, which could have been done, to save the cotton from being burned."
5. *Competency of party as witness.*—Under the provisions of the act approved February 14, 1867, (Session Acts, 1866-67, p. 435,) the plaintiff is competent to testify for himself, although the action is against a corporation; and although it was commenced before the passage of that act.
 6. *Proof of conductor's skill.*—In such action, the defendant can not be allowed to adduce evidence of skill on the part of the conductor, who had charge of the train at the time of the loss, unless the plaintiff has first introduced proof of unskillfulness on his part.
 7. *Liability of common carrier for negligence.*—In a contract for the transportation of cotton by a railroad company, a stipulation, or exception, by which the consignor agrees to assume all risk of loss or damage by fire, does not relieve the company from liability for a loss by fire caused by the negligence of its servants; and if placing the goods on an open, uncovered car, constitutes negligence, notice to the consignor, at the time of the shipment, that they would be carried on such a car, would not relieve the company from liability for the loss.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by William Edmonds, against the appellant, and was commenced on the 26th February, 1866. The complaint was in the following form: "The plaintiff claims of the defendant, a corporate body, incorporated by an act of the general assembly of the State of Alabama, ten thousand dollars, as damages, for the failure to deliver certain goods, to-wit, twenty-three bales of cotton, received by him as a common carrier, to be delivered to Price, Francis & Co., at Montgomery, Alabama, for a reward; which he failed to do. The plaintiff also claims of the defendant, a body corporate," &c., "ten thousand dollars, as damages, for the failure to deliver certain goods, to-wit, twenty-three bales of cotton, marked as follows," (specifying the marks,) "received by him as a common carrier, to be delivered to Price, Francis & Co., at Montgomery, Alabama, for a reward; which he failed to do. The plaintiff also claims of the defendant, a body corporate as aforesaid, ten thousand dollars, as damages, for the failure to deliver certain goods, to-wit, twenty-three bales of cotton, received by him as a common carrier, to be delivered to Price, Francis & Co., at Montgomery, Alabama, for a reward; which he failed to do; and plaintiff avers, that

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said cotton was destroyed whilst in the possession of the defendant as such common carrier, and that said destruction could have been prevented by due care and diligence. The plaintiff further claims of the defendant, a body corporate as aforesaid, ten thousand dollars, as damages, for the failure to deliver certain goods, to-wit, twenty-three bales of cotton, received by him as a common carrier, to be delivered to the plaintiff, at Montgomery, Alabama, for a reward; which he failed to do." The defendant filed a demurrer in these words: "The defendant comes, and says, that the complaint, as to each count thereof except the last, is insufficient in law, and sets down the following grounds of demurrer: 1st, that neither of said counts alleges ownership in the plaintiff of the property delivered to the defendant for transportation; 2d, that neither of said counts alleges that the property was delivered by the plaintiff to the defendant for transportation." The court overruled the demurrer, and the cause was submitted to a jury, on issue joined, at the March term, 1867; but the record does not show what pleas were filed.

"On the trial," as the bill of exceptions states, "the plaintiff offered to prove, by one Price, that two bags of cotton were shipped by the plaintiff to him or his partner (Francis), about the 29th January, 1866; that said two bales were received by said Price & Francis, weighed five hundred, and four hundred and ninety-five pounds, and were sold for forty cents per pound, being classed as 'low middlings; that these two bales were part of the lot of twenty-five bales, which were mentioned in the contract between plaintiff and defendant, hereinafter set out. This proof was offered to show the weight of the remainder of said cotton. The defendant objected to said proof, as incompetent and illegal evidence of the weight of the other twenty-three bales; but the court overruled the objection, and admitted said proof for said purpose; to which the defendant excepted.

"In order to show that the defendant had taken such care of the cotton as the law and the contract between the parties required should be taken, the defendant offered one Thomas Shehan as a witness, and showed by him that said

cotton was burned, while *en route* to Montgomery, on board one of the defendant's cars, under the care of said witness as conductor; and said witness proved, that he had been on the railroad, as baggage-master, and then as conductor, for many years. Defendant then asked said witness, whether every thing was done, which could have been done, to save the cotton from being burned. The plaintiff objected to this question, and the court sustained the objection; to which the defendant excepted.

"The defendant asked D. H. Cram, whether the car, on which the cotton was burned, was destroyed with the cotton, by being burned; to which he answered, yes. The defendant then asked, what was the value of the car. The plaintiff objected to this question, as eliciting illegal proof, and the court sustained the objection; to which the defendant excepted. The defendant offered to prove, by D. H. Cram, who has been the superintendent of said road for many years, and acquainted with the value of its rolling stock, what was the value of the car on which the plaintiff's cotton was shipped. This proof was rejected by the court, on the plaintiff's motion, and the defendant excepted.

"The plaintiff offered himself as a witness, to prove the amount of cotton shipped, the circumstances of the shipment, and the condition of the bales. The defendant objected to his competency as a witness, but the court allowed him to testify *in limine*; to which the defendant excepted. On cross-examination of said plaintiff as a witness, the defendant asked him, what he gave for the cotton sued for, in order to prove the value of said cotton. The plaintiff objected to this proof, and the court sustained the objection; to which the defendant excepted.

"The defendant offered to prove, by D. H. Cram, after showing that he had been superintendent for many years, and skilled in the matter of transportation by railroad, that he was, and had been for many years, acquainted with said Shehan, the conductor who had charge of the cotton while *en route* to Montgomery; and that said Shehan was a cautious conductor, and skilled in his business at the time said cotton was shipped. To this proof, as to Shehan's skill and

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caution, the plaintiff objected, and the court sustained the objection; to which the defendant excepted.

“The defendant proved the following written contract, entered into between the plaintiff and the defendant, in reference to the risk from fire in shipping said cotton: ‘Chehaw Station, January, 25, 1866. The undersigned, shipper of twenty-five bales of cotton, hereby guaranties the *Montgomery and West-Point Railroad Company* against any and all claim for remuneration, should said cotton sustain loss or damage, or be consumed by fire, while at the depot of said road, or in transit over it; it being hereby understood by the undersigned, and agreed to as a contract, that the said *Montgomery and West-Point Railroad Company* will not be responsible for any loss or damage caused by fire, at its depot, or on its transit.’” (Signed by plaintiff, and attested by two witnesses.) “The defendant proved, also, that plaintiff was informed by defendant’s agent, before making the contract, that the defendant would have to carry the cotton on an open, or platform car; and that it was so carried. The said agent stated, also, in reply to a question by plaintiff, that the defendant would take the best care it could of the cotton; also, that the cotton was carried on open cars, because they had no others to put it on. There was evidence tending to show, also, that the cotton took fire, while on the cars, and twenty-three bales of it were destroyed; also, that it took fire from sparks from the engine, in consequence of being on an open or platform car. There was evidence tending to show that the cotton was placed on the seventh car from the engine, and that the danger of fire was in proportion to its propinquity to the engine; and that in the opinion of the witness, who proved that he was skilled in railroad transportation, having been engineer and superintendent of a railroad for many years, cotton on the seventh platform car on a train was safe from fire from the engine. There was evidence, also, tending to show that said cotton was placed on the fourth car from the engine, that there was no bell-rope communicating with the engine, an inadequate supply of water, and no covering whatever over the cotton. It was in proof, also, that the defendant did sometimes cover

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cotton on open cars with tarpaulin. There was evidence, also, tending to show that, after the discovery of the fire, it would have been impossible to extinguish it, without the loss of one bale ; while other evidence tended to show that, after the discovery of the fire, it would have been impossible to extinguish it at all ; and other evidence tending to show that, by throwing off one bale, the balance of the cotton could have been saved, and that one bale could have been thrown off. There was evidence, also, tending to show that said cotton was burned by the negligence of the defendant ; and that the rear car in the train, being the ninth from the engine, was an open car, loaded with castings. The witness Edmonds also proved the weight of each of said twenty-five bales of cotton.

“ The defendant requested the court, in writing, to charge the jury as follows : ‘ If the jury believe, from the evidence, that the plaintiff made a special contract with the defendant, by which the plaintiff assumed all risk of fire ; and that the plaintiff was informed by the defendant’s agent, before making the contract, that they could not carry his cotton, except in open, platform cars ; then, if the cotton was destroyed by an accidental fire, communicated from the engine, from the fact that it was put by the defendant on an open, or platform car, the fact that it was put by the defendant on such open car does not make the defendant responsible for the origination of the fire, if the car was placed at such a distance in the rear of the engine as, in the opinion of prudent men, experienced in railroad transportation, would make it safe from such accidents ; and further, that if the fire occurred under such circumstances, and the jury were satisfied, from the evidence, that no reasonable care could have saved the cotton from destruction after the fire occurred, then the defendant is not liable for its loss by fire ; and that if no reasonable care could have saved a certain part of it from destruction, then the defendant is not liable for the loss of such part of it as could not have been saved from destruction under such circumstances.’ The court refused to give this charge, and the defendant excepted to its refusal.”

The overruling of the demurrer to the complaint, the

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several rulings of the court on the evidence, and the refusal of the charge asked, are now assigned as error.

RICE, SEMPLE & GOLDTHWAITE, and CHILTON & THORINGTON, for appellant.—1. Each count in the complaint, except the last, is fatally defective, because they show no right of action whatever in the plaintiff. They do not aver that he was the owner or consignor of the lost cotton, or that he had any interest whatever in it; while each of them avers that a third person was the consignee, and thereby shows a right of action in him, if any right of action whatever exists. For aught that appears in these counts, the plaintiff is a mere stranger, and has no more right to sue for a breach of the contract declared on than any other stranger had. They show a right of action, if any at all, in favor of Price, Francis & Co., the consignees.—*Hyde v. Navigation Company*, 5 Term Rep. 390; *Gibson v. Culver*, 17 Wendell, 306, and cases there cited; *Cavanaugh v. Such*, 1 Price, 328; *Brown v. Hodgson*, 2 Camp. 36; 14 Mees. & Wels. 403; *Dawes v. Peck*, 8 Term, 336. The provisions of the Code do not aid the complaint, because it is not in the form prescribed by the Code. The only form of complaint prescribed in the Code, for an action “against a common carrier,” is in favor of the consignee of the goods, and contains an averment that they were to be delivered to him. When the action is by any other person, the complaint must aver ownership in him, or contain some other allegation showing a right of action in him.

2. An exception was not necessary, to present this point for revision. The error appears of record, and would have been good on appeal, if the judgment had been by default. *Henry v. Porter*, 29 Ala. 619; *McCollum v. Hogan*, 1 Ala. Rep. 517.

3. Evidence of the weight or value of the bales which were delivered, was irrelevant—did not tend to establish any fact in issue, and ought not to have been admitted.

4. The defendant ought to have been allowed to prove the value of the car, on which the plaintiff's cotton was transported, and which was burned with the cotton. The evidence tended to show a motive, on the part of the de-

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fendant and its agents, to exercise due care and diligence, and thereby to rebut any imputation of negligence.

5. Proof of the skill and competency of the defendant's agent, Shehan, who had charge of the cotton at the time of the accident, was competent.—*Walker v. Bolling*, 22 Ala. 294; *Cook & Scott v. Parham*, 24 Ala. 35. It was one of the facts conducing to show due care and caution on the part of the defendant, and was admissible on that ground. *Malton v. Nesbit*, 1 Car. & P. 70; 2 Phil. Ev. (C. & H.'s Notes,) 760—61.

6. The charge asked and refused, ought to have been given, if any effect whatever is accorded to the special contract between the parties. The loss was within the very terms of the exception, and the risk of loss or damage from that source was expressly assumed by the plaintiff. Under the proof, no question of negligence arises, and the only question is as to the validity of the special contract, by which the plaintiff assumed the risk of fire. All the cases recognize the right of a common carrier thus to limit, by special contract, the great liability which the common law cast upon him; and no principle of public policy intervenes, in this case, to modify the terms of the special contract.—*Steele & Burgess v. Townsend*, 37 Ala. 247, and authorities there cited.

D. CLOPTON, *contra*.—1. The complaint pursues the only form given in the Code, for an action against a common carrier, and is therefore sufficient. That no averment of ownership in the plaintiff, or other equivalent averment of a right of action in him, was necessary, see *Crimm's Adm'rs v. Crawford*, 29 Ala. 623; *Douglass v. Beasley*, at the last term. A bill of lading, by the custom of merchants, has a peculiar force and efficacy, and shows a right of action in the consignee.—*Abbott on Shipping*, (6th Amer. ed.) 636; *Akerman v. Humphrey*, 1 Carr. & P. 53; *Jenkins v. Osborne*, 8 Scott, (N. R.) 516; *Allen v. Williams*, 12 Pick. 297; *Buffington v. Curtis*, 15 Mann. 527. But the complaint here does not aver any bill of lading in favor of Price, Francis & Co., and, consequently, shows no right of action in them.

2. The demurrer was not to the counts which are alleged

Montgomery & West Point Railroad Company v. Edmonds.

to be defective, but to the whole complaint; and, as the last count is admitted to be unobjectionable, the demurrer was properly overruled. Nor was any exception reserved to the action of the court on the demurrer, which was necessary to enable this court to revise the ruling of the primary court.—*Mahoney v. O'Leary*, 34 Ala. 97; 38 Ala. 514.

3. The character of the conductor, for skill and caution, not having been assailed by the plaintiff, evidence of his character was not admissible for the defendant. The rule is a familiar one in criminal cases.

4. The plaintiff was competent to testify for himself, under the provisions of the act approved February 14, 1867. Session Acts, 1866-67, p. 435. The competency of a witness is to be determined by the law which is in force at the time of the trial.

5. The question put to the witness Shehan, asked his conclusion from the facts, and his opinion on the very question in issue.—23 Ala. 469; 24 Ala. 201; 27 Ala. 480; 27 Ala. 651.

6. There was evidence tending to prove negligence on the part of the defendant in the transportation of the cotton. If the loss was the result of such negligence, the defendant is liable, notwithstanding the special stipulation in the contract.—*Steele & Burgess v. Townsend*, 37 Ala. 247; *Mobile & Ohio Railroad Co. v. Hopkins*, at the present term.

BYRD, J.—1. In the case of *Douglas v. Beasley*, (40 Ala. 142,) this court held, that the word "claims," used in the forms of pleading prescribed by the Code, is not, of itself, a sufficient averment of ownership, in the plaintiff, to a promissory note payable to another; and that a judgment rendered on a complaint on such a note, with such an averment, by default, is reversible on appeal. I dissented in that case, but recognize my duty to conform my judicial action to that adjudication, at least, until it is overruled.

The first three counts of the complaint in this case employ no other averment of ownership in the plaintiff, than the word "claims;" and a demurrer was interposed thereto, on the ground, that there was no allegation of ownership contained in either of those counts. So far from any own-

ership being alleged in those counts, the legal effect of the allegations is, that the title to the cotton is in Price, Francis & Co. The form prescribed in the Code, for a complaint "against a common carrier," contains, in addition to the term "claims," the allegation "to be delivered to the plaintiff," &c. This is, in legal effect, equivalent to an averment of ownership in the plaintiff. For the law presumes, in the absence of other proof, that the consignee of chattels personal is the owner thereof. Now, if, as in the case of *Douglas v. Beasley*, the word "claims" is not a sufficient averment of ownership to sustain a judgment by default; *a fortiori*, it is not sufficient on demurrer.

In *Crimm v. Crawford*, (29 Ala. 623,) it was held, that the word "claims" was sufficient, because that was the only allegation of ownership used in the form prescribed by the Code, "for the recovery of chattels in specie;" and that was such an action. It is true, in that case, the court says, "The only requisite to a good complaint is, to state that the plaintiff claims, and what he claims." But that must be construed with reference to the case then before the court.

The form prescribed by the Code, for a complaint "against a common carrier," is clearly and materially different from the one "for the recovery of chattels in specie," in this, that the former contains the word "claims," and the allegation "to be delivered to the plaintiff," while the latter contains no allegation of ownership, but such as may be predicated on the word "claims."

So far from the first three counts of the complaint conforming to the requisitions of the Code, they are in direct antagonism therewith, and with the rules of pleading at common law. Hence, the demurrer to the complaint should have been sustained.

2. It was competent for the appellee to prove the weight of the twenty-five bales of cotton, and of two of the bales which were not lost, in order to enable the jury to ascertain the weight of the twenty-three bales which were burned. When the relevancy of evidence depends upon proof of another fact, there is no error in its admission, if such proof is afterward made.—*Bell v. Chambers*, 38 Ala. 660.

Hence, the admission of evidence of the weight of the two bales of cotton can not work a reversal.

3. The value of the car burnt had no relevancy to any question in issue, so far as the record discloses.

4. The court did not err in refusing to permit the question to be answered, whether everything was done, which could have been done, to save the cotton from being burned. This was a matter for the jury to determine, and not the witness. A witness may, in some instances, be permitted to give an opinion; but this is not one of them.—*Gibson v. Hatchett*, 24 Ala. 201; 23 Ala. 469; *Brice v. Lide*, 30 Ala. 647; *Gregory v. Walker*, 38 Ala. Rep. 26; *Nuckolls v. Pinckston*, 38 Ala. 615.

5. The appellee was a competent witness, under the act approved February 14th, 1867.—Pamphlet Acts, 435.

6. As a general rule, the character of an agent or servant, for caution and skill in the business in which he is employed, can not be proved by the principal, unless it has been assailed by the adverse party. For it makes no difference, how skillful or expert the servant may be, if any loss has occurred from his negligence, for which his principal is responsible. It neither makes out a defense, nor mitigates the damages, to prove the skill of such servant. But, when a party deems it necessary to make proof of the unskillfulness of the servants of the principal, in order to establish the cause of action, then it is permissible for the defendant to prove the character of such servants for skill in the business in which the damage is alleged to have been inflicted. The appellee did not attempt to predicate his claim to damages on proof of the want of skill of the conductor. Until so assailed, the law indulges the presumption, that he was skillful and competent in the business in which he was employed; and it is not error to exclude evidence of the existence of a fact which the law presumes to exist, until that presumption is attempted to be overthrown by proof. The following references will be sufficient for this question.—*Franklin v. The State*, 29 Ala. 14; *Ben v. The State*, 37 Ala. 103; *Otis et al. v. Thom*, 23 Ala. 469.

7. Notwithstanding the appellee assumed the risk of loss by fire, the appellant was responsible for loss resulting from

the negligence of its servants, though it was occasioned by fire. *If* a carrier can contract against loss from *the negligence* of his servants, so as to bind the owner or shipper of goods, yet such contract must be clear and explicit. It is not so in this case; and it would be against public policy to give this contract such a construction, when a different one can be given.—*Mobile & Ohio R. R. Co. v. Hopkins*, at the present term. The notification to the appellee, that the cotton would be carried on an uncovered car, does not relieve appellant from liability, if the putting it on such car was negligence.—*Steele v. Townsend*, 37 Ala. 247. But, whether such loading was negligence, was a question for the jury. Hence, the court properly refused to give the charge asked.

It results, that the judgment must be reversed, for the error committed in overruling the demurrer.

ROSE'S EXECUTORS *vs.* BOZEMAN.

[ACTION FOR BREACH OF SPECIAL CONTRACT TO DELIVER COTTON.]

1. *Measure of damages.*—In an action by the buyer, against the seller, to recover damages for the breach of a special contract to deliver cotton at a specified time and place, the measure of damages is the value of the cotton at the time of the breach; and the fact that the price has been paid in advance, does not affect the principle.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. JOHN K. HENRY.

THIS action was brought by Howell Rose, against Nathan Bozeman and D. W. Bozeman, and was commenced by original attachment, which was sued out on the 4th August, 1865, and which was levied on fifty-one bales of cotton, as the property of said Nathan Bozeman. At the fall

term, 1865, the plaintiff discontinued his action against D. W. Bozeman, and filed a complaint against Nathan Bozeman alone. The complaint contained but a single count, which was as follows: "The plaintiff claims of said defendant thirty thousand dollars, as damages, for the breach of an agreement entered into by him and said D. W. Bozeman, dated at Wetumpka, on the 3d June, 1863, by which they promised to deliver to said plaintiff, on the 1st day of January, 1865, to said plaintiff or order, in the city of Wetumpka, forty-eight thousand eight hundred and forty-six pounds of ginned cotton, packed in bales, and in good merchantable order, and of the quality of 'middlings'; and plaintiff avers, that said defendant and D. W. Bozeman did not, nor did either of them, deliver to said plaintiff, or to his order, on the 1st day of January, 1865, or since, at the city of Wetumpka or elsewhere, forty-eight thousand eight hundred and forty-six pounds, nor any other quantity of ginned cotton, packed in bales or otherwise, in good merchantable order, and of the quality of 'middlings,' nor of any quality; and plaintiff says, that he has been damaged, by the said breach of said agreement, thirty thousand dollars, which he claims in this suit."

At the February term, 1867, the death of the plaintiff was suggested, and the action was revived in the names of W. T. Hatchett and others, as his executors; and the plaintiffs filed, by leave of the court, an additional count, in these words: "And plaintiff further claims of said defendant thirty thousand dollars damages, for the breach of another agreement, entered into and made with said plaintiff, on the 3d day of June, 1863, by said defendant and one D. W. Bozeman, in writing, whereby they promised to deliver to said plaintiff or order, on the 1st day of January, 1865, in the city of Wetumpka, forty-eight thousand eight hundred and forty-six pounds of ginned cotton, packed in bales, and in good merchantable order, and the quality to be 'middlings'; and said plaintiff avers, that the consideration of said promise and agreement by said defendant and D. W. Bozeman was the delivery of forty-eight thousand eight hundred and forty-six pounds of ginned cotton, packed in bales, by the said plaintiff to the said

defendant, in the said city of Montgomery, on (to-wit) the 3d day of June, 1863, and said defendant and D. W. Bozeman, in consideration thereof, made their promise aforesaid. And plaintiff further avers, that said Nathan and D. W. Bozeman did not, and that neither of them did, deliver to said plaintiff, or to his order, in the city of Wetumpka or elsewhere, on the 1st day of January, 1865, or at any other time since that day, forty-eight thousand eight hundred and forty-six pounds of ginned cotton, packed in bales, and in good merchantable order, of the quality of 'middlings,' nor any quantity of ginned cotton, packed in bales or otherwise; and he therefore claims the said sum of thirty thousand dollars as damages." The defendant demurred to the complaint, and to each count thereof; and his demurrer being overruled, he then pleaded "the general issue, with leave to give any special matter in evidence." Issue was joined on this plea, and a trial was had at the same term.

On the trial, as the bill of exceptions states, the plaintiffs offered in evidence the contract on which the suit was founded, which was dated "Wetumpka, June 3, 1863," was signed by said Nathan and D. W. Bozeman, and was in these words: "On the first day of January, 1865, we promise to deliver to Howell Rose or order, in the city of Wetumpka, forty-eight thousand eight hundred and forty-six pounds of ginned cotton, packed in bales, and in good merchantable order, and the quality to be middlings." "The plaintiffs proved the execution of said contract by said Nathan and D. W. Bozeman, and that the consideration of said contract was the loan and delivery by said Howell Rose to said defendant, Nathan Bozeman, on the 3d day of June, 1863, of an equal amount of ginned cotton, of similar quality, and packed in bales; and proved the value of cotton of that class to have been worth in gold, in the city of Wetumpka, in the months of October and December, 1865, from forty to fifty cents per pound in 'greenbacks,' and from thirty to thirty-two cents in gold in said last named months of 1865. There was evidence, also, that cotton of that class was worth about two cents per pound in gold on the first day of January, 1865. The

court charged the jury, that the measure of damages was the market value of the specified quantity and quality of the cotton stipulated to be delivered, in the city of Wetumpka, on the first day of January, 1865, with interest thereon from that day until the present time. To this charge, on account of which the plaintiffs took a nonsuit, they duly excepted ;” and they now assign said charge as error.

ELMORE, KEYES & MORRISSETT, for appellants.

GOLDTHWAITE, RICE & SEMPLE, *contra*.

JUDGE, J.—The question for decision in the present case is, what is the correct rule of damages, in a suit by the vendee against the vendor, for a breach of contract in failing to deliver, at the time specified in the contract, articles of personal property, for which payment has been made in advance. It is contended by counsel for appellants, that the analogy between the action of trover and an action of assumpsit founded upon the breach of such a contract, is so complete, that the rule of damages should be the same in both actions ; and that to prescribe a rule of damages for the one different from that prescribed for the other, would be positive inconsistency.

Let us inquire into the rule, as established in this State, in the action of trover. The true measure of damages, in such action, “where the thing converted has a fixed value, is that value at the time of the conversion ; and the jury *may* give interest upon it. If the value is fluctuating, the jury *may* take the highest value at any time between the conversion and the trial.”—*Strong v. Strong*, 6 Ala. 345 ; *Tatum v. Manning*, 9 Ala. 149 ; *Lee v. Mathews*, 10 Ala. 682 ; *Ewing v. Blount*, 20 Ala. 649 ; *Jenkins v. McConico*, 26 Ala. 213. But there are exceptions to this general rule, and cases to which it has no application. “In ascertaining the damages, in many actions of trover, it is allowable to mitigate them, by investigating and determining what (for want of a phrase of greater accuracy) is called the *equity of the case*.”—*Williams v. Crum*, 27 Ala. 468.

We have no disposition to disturb the law as it has been thus long settled, and repeatedly acted upon, in this State, relating to the measure of damages in the action of trover. But let us see how it would operate in its application to an action *ex contractu*, of the character of the one before us. In an action of this character, we understand it to be settled beyond controversy, that neither *exemplary* damages, nor such as are *remote* and *consequential*, or purely *speculative*, are recoverable; but only such as are the *natural* and *proximate* consequence of the act complained of. The plaintiff is limited to a just compensation for his actual loss—is entitled to an indemnity, and nothing more; and, consequently, is never to be placed in a better situation than that in which he would have been, had the contract been fulfilled.—*Suydam v. Jenkins*, 3 Sand. Sup. Ct. Rep. 637. And furthermore, the compensation to which he is entitled is to be awarded as damages according to *established rules*, and its amount “is a question of law, not governed by any arbitrary assessment, nor, on the other hand, left to the fluctuating discretion of either judge or jury.”—Sedgwick on Damages, m. p. 29.

Is it not obvious, that the rules which obtain in the action of trover, would, if applied to the action of assumpsit, when founded upon the breach of an executory contract, be subversive of the rules above announced, as applicable to actions of the latter class? If thus applied, the amount of damages would be left to the “*fluctuating discretion of the jury*,” and in the exercise of their discretion, damages purely speculative, or plainly vindictive, might be assessed. They would be conjectural and speculative, if the highest value at any time between the breach and the time of trial should be selected as the measure, and it were barely possible that the plaintiff would have retained the possession had the article been delivered, and would have realized said intermediate higher value; and they would be vindictive, should it appear certain that no such benefit could have resulted to the plaintiff.—*Suydam v. Jenkins*, *supra*.

Take for example the case before us. By the terms of the contract, the cotton was to be delivered in the city of Wetumpka, on the first day of January, 1865. Its market

value, at that time and place, was about two cents per pound in gold. In the months of October and December, of the same year, its market value at the place of delivery was from thirty to thirty-two cents per pound in gold, and from forty to fifty cents per pound in greenbacks; and this, so far as the record discloses, was all the evidence introduced relating to the value. Now, how can it be said that the loss sustained by the testator of appellants, from the non-delivery of cotton on the first day of *January*, 1865, was the value of the cotton in *October* and *December* of the same year, when it can not be known that he would have *kept it* until one of the last named months, and would then have *sold it* for the advanced price? Can it be said to be more than possible that he would have done this? And if barely possible, would not the selection of the price in the months named as the measure of damages, be awarding damages purely conjectural and speculative? It is certain, that the damages awarded by such a rule would not be the "*natural* and *proximate*" consequence of the breach complained of.

We are unwilling to extend the rules established in the action of trover, as to damages, to an action of *assumpsit* like the one we are considering; and we can perceive no logical necessity for such a result. It is true there is an analogy between the two actions, in so far as the personal property which is the subject of litigation in each has been withheld from the party rightfully entitled to the possession of it; but in all other respects they are quite dissimilar, resting as they do upon totally different grounds, asserting totally different rights, seeking to redress totally different grievances, and requiring totally different evidence to support them.

In an action founded upon the breach of a contract for the failure to deliver articles of personal property at the time specified in the contract, the general rule is, that the measure of damages is the value of the article at the time it is to be delivered. But there has been conflict of opinion, and contrariety of decision, as to what should be the rule when payment for the article has been made in advance. We shall not attempt a review of even the princi-

pal cases involving the latter question. A collocation and review of them may be found in Sedgwick on the Measure of Damages, marginal pages 261 to 276, inclusive.

Chancellor Kent, in his Commentaries, (vol. 2, p. 480,) says: "The general rule is well settled, that in a suit by vendee for a breach of contract on the part of the vendor, for not delivering an article sold, the measure of damages is the price of the article at the time of the breach." In commenting upon this extract, Mr. Sedgwick, in his work before cited, (page 274,) says: "The learned chancellor appears here to overlook the distinction, resulting, as we have seen, from the payment of the price beforehand, which runs through these cases, and which is entirely analogous to the rule in trover; that the value of the chattel, not at the moment of the conversion, but its highest value up to the time of trial, is the rule of damages." Chancellor Kent, in a note to the 6th edition of his Commentaries, replies to these remarks of Mr. Sedgwick as follows: "The learned author is mistaken, in supposing I had overlooked that distinction. These commentaries are not calculated to embody all the nice, or arbitrary, or fanciful distinctions that are to be met with in the reports. I do not regard the distinction alluded to as well founded or supported. It is disregarded, or rejected, by some of the best authorities cited. The true rule of damages is the value of the article at the time of the breach, or when it should have been delivered. Mr. Sedgwick seems himself to come to that conclusion amid the contrariety of opinion and cases which he cites." Chancellor Kent is correct in his statement as to the conclusion attained by Mr. Sedgwick upon the question, (Sedg. Meas. Dam., 3d edition, m. pp. 273, 274, 275,) though, as the latter says, (p. 271,) he is admonished, in the perplexing conflict of opinion, to refrain from any dogmatical declaration of the existing rule.

But the counsel for appellants invoke the name of Chief Justice Marshall as an authority in opposition to the rule as declared by Chancellor Kent; and the case of *Shepherd v. Hampton*, 3 Wheaton, 200, is cited in support of the position. The precise question we are considering was not involved in that case. It is true, Chief Justice Marshall, in

his opinion delivered in the case, said: "For myself, only, I can say that I would not think the rule would apply to a case where advances of money had been made by the purchaser under the contract. But I am not aware what would be the opinion of the court in such a case." This, as was correctly said by Rogers, J., in *Smethurst v. Woolsten*, (5 Watts & Sergeant, 106,) "though doubtless entitled to great respect, is but a mere *dictum* of the eminent jurist."

After a careful consideration of the question, we feel constrained by reason, as well as by what we conceive to be the weight of authority, to adopt the following as the rule of damages in cases like the present—viz., the value of the article at the time of the breach, with interest, for delay; unless it be shown that the article was to be delivered for some specific object known to both parties at the time, and that thus a loss, within the contemplation of both parties, has been sustained. We cite the following adjudications of this court, as bearing upon the question, and in effect, as we conceive, recognizing the rule to be as we have stated it.—*Pinkston v. Huie*, 9 Ala. 252; *Willis v. Dudley*, 10 Ala. 93; *Milton v. Rowland*, 11 Ala. 132; *Oswald v. Godbold*, 20 Ala. Rep. 811; *Gibson v. Marquis and Wife*, 29 Ala. 668; *Younge v. Holley*, 27 Ala. 203; *Bozeman v. Rose*, 40 Ala. 212; *McGehee v. Posey*, at the present term.

We also quote with approval, what Mr. Sedgwick says, in commenting upon the rule as we have stated it: "The fact of payment in advance throws no light on the injury sustained by the purchaser; nor does it at all increase the probability that he would have retained the article till the rise of price. The value of the article at the time of breach, with interest for delay, and subject to the above exception, [the exception we have named,] seems to me as near an approach to the actual loss sustained as can be effected, without embarking upon a vague search after facts impossible, in most cases, to be proved with any degree of satisfaction. And if this rule be sound, it applies as well to cases where the property has fallen, as to those where it

has risen. The purchaser claims his advance ; but, if he gets the value of the article at the time of the breach, the contract is performed ; and if this sum be less than his advance, his loss is ascribable purely to his own bargain. It may undoubtedly be urged, and with force, that the contract being violated by the defendant, the retention of any part of the plaintiff's money is against conscience. I have already, however, said that, in actions of contract, the only object of the tribunal must be to carry into effect the agreement of the parties, as far as possible, and that the motives of the defaulter are not to be taken into view. If this be correct, then certainly it removes the last objection to the adoption of the general rule, that the value at the time of the breach, with interest for delay, is, with the exception of the defendant's liability to make remuneration for loss resulting from facts within the knowledge and in the contemplation of both parties at the time of the contract, to furnish the measure of damages."

We conclude by remarking, that no general rule of damages can, perhaps, be established for application to all cases like the present, that will be entirely free from objection, or that will not, at times, work injustice ; but, when injustice, in a particular case, results from the observance by the court of a general rule of law, it is obviously better for the public weal, and a far less evil, that such injustice should be patiently borne by the individual party, than that the court should, for the purpose of relieving him, usurp the power of breaking the settled law, which defines the rights of all.

Judgment affirmed.

ROSE vs. PEARSON.

[ACTION FOR RECOVERY OF SLAVES.]

1. *Form of judgment.*—In detinue for slaves, (or in the analogous action prescribed by the Code, p. 552, “for the recovery of chattels in specie,”) the action having been commenced before the abolition of slavery, a judgment, on verdict, may be rendered for the plaintiff, for the slaves or their alternate value, notwithstanding the abolition of slavery before the trial. (BYRD, J., not concurring.)
2. *Form of verdict: assessing separate value of property: judicial notice of abolition of slavery.*—In such action, the failure of the jury to assess the value of each of the slaves separately, if erroneous, is not an error of which the defendant can complain; since the abolition of slavery, of which the court will take judicial notice, has rendered it impossible for the defendant to make a voluntary delivery of the slaves, and impossible for the plaintiff to compel their delivery by any legal process.
3. *Form of judgment: error without injury.*—In an action for the recovery of slaves, brought by a mortgagee, judgment on verdict having been rendered for the plaintiff, since the abolition of slavery, for the slaves or their alternate value: an entry in the judgment, made at the instance of the plaintiff, to the effect that “this judgment is to be discharged on the payment of” the balance due on the mortgage debt, as ascertained by the verdict of the jury, is, at most, error without injury.

APPEAL from the Circuit Court of Henry.

Tried before the Hon. HENRY D. CLAYTON.

THIS action was brought by Benjamin F. Pearson, against Columbus A. Rose, and was commenced on the 3d April, 1861. The complaint was in the form prescribed by the Code, (p. 552,) “for the recovery of chattels in specie,” and contained but a single count; by which the plaintiff claimed of the defendant twenty-four slaves, whose names were specified, “together with the value of the hire or use thereof during their detention, to-wit, from the 2d day of April, 1861.” On the day the summons and complaint were issued, the plaintiff’s agent made affidavit of ownership of the slaves; and gave bond, the condition of which was, “that if the said plaintiff is cast in said suit, he will pay the de-

fendant all such costs and damages as he may sustain by the wrongful complaint;" and the clerk thereupon made an endorsement on the summons, commanding the sheriff to take the slaves into his possession, "unless the defendant give bond, with good and sufficient sureties, as in detinue cases, conditioned for the forthcoming of the property to answer the lien created by a mortgage, executed by the defendant to the plaintiff on the 8th day of December, 1858, to secure the payment of two notes," (which were particularly described, and the last of which only was said to be unpaid,) "or, in default thereof, to pay such debt and interest, with all costs." The record does not show when the summons and complaint were executed. On the 18th April, 1861, the defendant gave a replevy bond, the condition of which was, "that if the said C. A. Rose shall have the property sued for forthcoming to answer the lien created by a mortgage, executed by him to the plaintiff on the 8th December, 1858, to secure the payment of two notes," &c., (described as in the endorsement on the writ,) "or, in default thereof, pay such debt and interest, with all costs."

At the October term, 1861, the defendant filed a plea of *non detinet*; and at the October term, 1866, a trial was had on issue joined on that plea. The verdict of the jury was in these words: "We, the jury, find the property sued for to belong to the plaintiff, and assess the value at twenty thousand dollars, and that the defendant owes the plaintiff eight thousand one hundred and fifty-one 50-100 dollars, balance due on note;" and the court thereupon rendered a judgment, which, after stating the appearance of the parties, the verdict, &c., proceeded thus:—"It is therefore considered by the court, that the plaintiff recover of the defendant the said property sued for, to-wit," (specifying the slaves by name,) "or the said sum of twenty thousand dollars, their alternate value, together with the costs of suit; for which let execution issue. And it is ordered, at the instance of the plaintiff, that this judgment is to be discharged on the payment of said sum of eight thousand one hundred and fifty-one 50-100 dollars, the balance found by the jury to be due on the note, with interest from this date, together with all costs." The defendant afterwards

moved in arrest of judgment—"1st, because the jury did not assess the value of each slave separately; and, 2d; because the verdict does not support a judgment." The motion in arrest was overruled by the court.

There is no bill of exceptions in the record. The judgment of the court is assigned as error.

GEO. W. STONE, and ALPHEUS BAKER, for appellant.

JAS. L. PUGH, and F. M. WOOD, *contra*.

A. J. WALKER, C. J.—This is an action to recover personal property, in the form prescribed by the Code, and is analogous to the common-law action of detinue. The action was brought on the third day of April, 1861, and had for its object the recovery of slaves. It was tried, and judgment rendered, in October, 1866, after the slaves were emancipated, for the slaves or their value. A reversal is sought, upon the ground, that the court must judicially know that the slaves had ceased to be property before the judgment, and that the termination by legal authority, of property *pendente lite*, deprived the plaintiff of a right to the judgment he obtained.

That the death of slaves, pending an action of detinue for the recovery of them, does not affect the plaintiff's right to a judgment for the property or its alternate value, is *res adjudicata* in this State.—*White v. Ross*, 5 St. & P. 123; *Bettis v. Taylor*, 8 Porter, 564; *Bell v. Pharr*, 7 Ala. 807; *Johnson v. Marshall*, 34 Ala. 521. The weight of authority in other States is to the same effect.—*Carrel v. Early*, 4 Bibb, 276; *Caldwell v. Fenwick*, 2 Dana, 332; *Barsksdale v. Appleberry*, 22 Missouri, (2 Jones,) 389; *Haile v. Hill*, 13 Missouri, 612; *Austin v. Jones*, 1 Virginia R. (Gilmer,) 341; *Betha v. McLennon*, 1 Iredell's Law, 523. These are all the decisions, bearing upon the question, which we have found.

In *Haile v. Hill*, (*supra*,) there is a *dictum*, the import of which can not be determined with certainty on account of the imperfect report of the case, but which *seems* to assert that, in case of death pending the suit, there can be no recovery of the alternate value. If such be the assertion

of the court, the weight of it as an authority is destroyed by the later and better considered decision by the same court in *Barksdale v. Appleberry*, *supra*. In the Virginia case of *Austin v. Jones*, three judges delivered opinions. Coalter, J., one of them, held that no judgment for the alternate value could be given; Brooke, J., in an able argument, held the contrary; while the third judge (Roane) contributed to support the opinion of Judge Brooke, but placed his decision upon a point of pleading, declining to commit himself on the point debated by the other two judges. In the case cited from Iredell's Reports, Judge Gaston insisted, (the point not arising, and being examined only at the request of the attorneys,) that the death of the slave precluded a recovery of the value. In his decision, Judge Gaston assails an older North Carolina decision, which stood opposed to his argument. This older decision (*Skipper v. Hargrave*, Martin's R. 74) is referred to by this court as an authority sustaining its conclusion in *White v. Ross*, *supra*. We have not had access to it.

By reference to the opinions of Judge Coalter of Virginia, and Judge Gaston of North Carolina, it will be found that they proceed upon the postulate, that the alternative value is to be ascertained as of the time of the trial; and thence it is argued, that, as the property was of no value at that time, nothing could be recovered. We are forbidden, in this State, to reason from the same postulate; for, here, the rule is the reverse, and the jury are permitted to fix any time between the demand and the trial for ascertaining the value.—*Johnson v. Marshall*, 34 Ala. 521.

Our old decision in *White v. Ross*, made in 1833, has never been questioned in this State, but has at least been indirectly sanctioned in later cases. It is consistent with our decisions, as to the latitude allowed to the jury in the selection of the time for the ascertainment of the value, and has, therefore, a strong claim to our respect as an authority. Beyond this, however, it is sustained by reason and justice. When an owner's property has been converted, there immediately springs up in his favor a right to have its value; and that right may be enforced in an action of trover, without the peril of defeat by the death or destruc-

tion of the property. If, in detinue, a recovery of the property or its alternate value is prevented by its death or destruction, it is obvious that that form of action is inadequate to redress the wrong, or enforce the right in its full extent. The plaintiff must yield his desire to obtain the specific property, or he must incur the peril of losing it in the possession of a *tort-feasor*. The policy of this court has been so to shape its adjudications in reference to the action of detinue as to encourage the delivery of property wrongfully withheld. This policy, which seems to us to be wise, would not be consulted, by placing the subject of litigation at the hazard of the owner, and relieving the wrongdoer from responsibility. Indeed, the contrary policy, when the property is of a perishable nature, would enable the defendant, by retaining possession, and prolonging the litigation, to defeat the plaintiff's right to enjoy his property.

We attach little importance to the argument drawn from the supposed absurdity of rendering a judgment for property which has ceased to exist. The judgment is not for the property, but for it or its alternate value. The alternative is provided for the case where the property is not attainable. If the defendant here had sold the property in the fall of 1861, for its full value, and received payment for it, it would be so shocking to justice, for him to be relieved from the payment of the alternate value by the subsequent death of the slaves, that the proposition would not be asserted; and yet the judgment, in that case, would be for that which had ceased to exist, or its alternate value. The plaintiff has been deprived of the possession of his property. Had he obtained possession, he might have sold it, and realized its full value. If we could look at the fact indicated by the record and commented upon by the counsel, that the plaintiff sought to recover the property as mortgagee, we would perceive very clearly, that the plaintiff could have sold the property and discharged the debt, if there had not been a wrongful detention from him. It is unjust and unconscientious, under such circumstances, that the loss, if it had resulted from death, should fall upon the plaintiff.

The case in hand is one where the property has not been destroyed by death, but the quality of property has been taken away by law. There is a destruction of property, in both cases, by *vis major*. An intervening occurrence, beyond the defendant's personal control, has alike in both cases disabled him to relieve himself by a delivery. The principle is not changed by the variation in the instrumentality of destruction. The plaintiff, in either case, has a right to the alternative value.

We have argued the question upon the supposition, that the defendant retaining the property is in the wrong. We do not mean moral wrong, for a party may fail in the defense of an action, who supposes himself to have a valid title. But the question which we have considered can not arise, except when the verdict is against the defendant, and there is thereby an ascertainment that he was legally in the wrong in the retention of the property which is the subject of litigation. It is, therefore, a legitimate assumption in the argument of the question, that the defendant is a wrongdoer, and a legitimate conclusion, that he, wrongfully keeping and converting another's property, does it at his peril.

The case of *Cole v. Conolly*, 16 Ala. 271, is so manifestly distinguishable from this, as to require but little remark. In that case, the property was in the legal custody of an officer, and was taken away from him by a judicial proceeding, which was held valid and binding upon the adverse party. It distinguishes between a cessation of plaintiff's title resulting from death or destruction, and such a cessation resulting from a change of title as between different citizens.

2. The verdict failed to ascertain the separate value of the several slaves. The reason of the requirement of the assessment of the values separately is to fix the amount necessary to pay the value of any of the several articles of property in discharge of the judgment *pro tanto*.—*Miller v. Jones*, 29 Ala. 174; *Haynes v. Crutchfield*, 7 Ala. 189; *Bell v. Pharr*, *ib.* 807; *Cummings v. Tindall*, 4 St. & P. 357. We judicially know that the slaves were free before the trial. The plaintiff could not compel the delivery of them by any process, and the defendant could not voluntarily deliver

them in discharge of the judgment, or any part of it. A separate valuation of each negro would, therefore, have been a mere supererogation; and it is clear beyond doubt that no prejudice has resulted from the omission. There can, therefore, be no reversal on that ground.

3. The insertion in the minutes, by the plaintiff's consent, that the judgment might be discharged by the payment of the smaller sum, being the amount of the mortgage debt, could not injure the defendant, and is no reason for complaint on error.

The judgment is affirmed.

BYRD, J., not concurring.

ROBINSON vs. CULLOM & CO.

[BILL IN EQUITY TO REDEEM LANDS SOLD UNDER MORTGAGE.]

1. *Variance between allegations and proof.*—Where lands are sold under a power of sale in a mortgage, and are conveyed by the purchaser, on the next day, to the mortgagee; and the mortgagor afterwards files a bill to set aside the sales, on the ground that they are pretended and fraudulent, and are therefore void; if the proof does not sustain the allegation of fraud, he can not have relief on the ground that the mortgagee himself, through the nominal purchaser as his agent, was the purchaser at his own sale.
2. *Certainty requisite in allegations of bill.*—Authorities cited as to the sufficiency of an averment that a sale was *pretended*, in a bill seeking to set it aside.
3. *Purchase by trustee or mortgagee, at his own sale.*—A purchase by a trustee or mortgagee, at his own sale, is not void, but voidable only, at the instance of the *cestui que trust* or mortgagor, expressed within a reasonable time; and under the circumstances of this case, (the bill not having been filed until after the lapse of more than four years and a half,) the delay was held fatal to the relief sought.

APPEAL from the Chancery Court at Montgomery.
Heard before the Hon. N. W. COCKE.

THE bill in this case was filed, on the 25th October, 1860, by Raymond Robinson, against Cullom & Co., (a partnership composed of Smith Cullom and Lovick P. Butler,) and several other persons; and sought to set aside a sale of certain lands, under a mortgage executed by said Robinson to said Cullom & Co.; and, to that end, it prayed an account of the mortgage debt, and of the rents and profits of the mortgaged premises while in the possession of the defendants, and a redemption of the mortgaged lands, or, alternately, if the mortgage debt was not paid and satisfied, a foreclosure of the mortgage to satisfy the balance due. The mortgage was dated the 15th day of February, 1853; conveyed certain lands in Autauga county, with several slaves, to secure the payment of a bill of exchange for six thousand seven hundred dollars, payable twelve months after date, and dated the 15th Februry, 1853; and contained a power of sale, if default were made in the payment of the bill at maturity. The mortgaged lands contained valuable pine timber, and a saw-mill was situated on them. Under the power of sale contained in the mortgage, the lands were sold by the mortgagees, on the 3d March, 1856, and were bid off by John W. Hughes, as the highest and best bidder, at the price of fifteen hundred dollars; and the mortgagees thereupon executed to him a conveyance of the lands. On the next day, (4th March, 1856,) said John W. Hughes and wife conveyed the lands to said Cullom & Co., on the consideration of fifteen hundred dollars; and Cullom & Co. afterwards conveyed to the other defendants to the bill. The plaintiff continued in the possession of the lands, after the execution of the mortgage, after the sale under the mortgage, and until after the sale by Cullom & Co. to the other defendants. The mill was burned down, soon after the execution of the mortgage; but was re-built, partly by the complainant, and partly by the purchasers from Cullom & Co.

The following are the material allegations of the bill, as to the sales and conveyances between Hughes and Cullom &

Co.: "2. Afterwards, to-wit, on the 3d March, 1856, said Cullom & Co. pretended to sell said lands, under the power of sale given to them in said mortgage, and executed a conveyance thereof to John W. Hughes, at and for the price of fifteen hundred dollars; a copy of which conveyance is hereunto attached," &c. "Shortly thereafter, to-wit, on the next day, the 4th day of March, 1856, said Hughes and his wife re-conveyed said lands to said Cullom & Co., at and for the price aforesaid, fifteen hundred dollars." "3. Your orator avers, that said sale from Cullom & Co. to said John W. Hughes was pretended and fraudulent; that said Hughes, in buying said land, acted as the agent of said Cullom & Co., and for their benefit, or at their instance and request, and made the purchase for them; that said Hughes paid no money to said Cullom & Co. for said land, and said Cullom & Co. paid no money to him, as the consideration for said re-conveyance to them; that, if there was any pretense of payment, the money, or other thing of value, if any, which was paid or delivered by said Hughes to said Cullom & Co. as the price or purchase-money for said land, was immediately, or shortly thereafter, paid back by them, or re-delivered to said Hughes. Your orator further avers, that there was an understanding and agreement, by and between said Cullom & Co. and said Hughes, made before said sale or re-sale took place, to the effect that said Cullom & Co. should convey said lands to said Hughes, and that said Hughes should re-convey to them, and that no money, or other thing of value, should be paid by either party to the other, as or for the purchase-money of said land." "4. Your orator further avers, that said sale by Cullom & Co. was made at public auction, after the notice, and at the place specified in said mortgage; that said Cullom & Co. applied to said Hughes, before said sale took place, and requested him to bid off the land for them at the sale; that said Hughes consented to said request, and, in pursuance thereof, bid off said land at said sale, at the price of fifteen hundred dollars; that no part of the purchase-money was paid by said Hughes; that said original conveyance and re-conveyance were thereupon executed and delivered, in pursuance of said request and agreement,

and for the purpose of enabling said Cullom & Co. to hold said land, or the title thereto, adversely to your orator, and for the purpose of depriving and defrauding him of his right, as against Cullom & Co., to have said mortgage foreclosed, and said land sold for the purposes therein expressed." "5. Your orator is advised, and so charges, that said sales from said Cullom & Co. to said Hughes, and from said Hughes to said Cullom & Co., and the said conveyances executed by them respectively for said land, were null and void; and that the respective rights and privileges of your orator, and of said Cullom & Co., under and by virtue of said mortgage, were not thereby affected, changed, or destroyed in any manner whatever."

The prayer of the bill was as follows: "Your orator prays, that said Cullom & Co. may be declared to be trustees, and that they held, and still hold, the title to said lands for the purposes expressed in said mortgage; that each and all of the conveyances hereinbefore mentioned, except said mortgage, be set aside, held for naught, and ordered to be given up to be cancelled; that said defendants, and each and every one of them, and all persons claiming through or under any or either of them, be enjoined and restrained from cutting the timber on said land, or using, or occupying the mill, houses, building, or land; that it be referred to the register, as master, to ascertain the balance, if any, due on account of the indebtedness secured by said mortgage, and to take and state an account of the rents, profits, and timber cut from said lands; and that the amount found due to your orator on account thereof, as far as the same may be necessary, be applied to the satisfaction and discharge of said mortgage debt; that, if the said mortgage debt is not thereby satisfied and discharged in full, said mortgage be foreclosed, and said land sold for the purposes therein specified; that, if said mortgage debt is satisfied and discharged as aforesaid, said mortgage be then cancelled, and your orator be let into the possession of said lands and tenements; and for such other and further relief as the nature of the case may require," &c.

Answers on oath were waived, as to all the defendants.

A joint answer was filed by the several defendants who claimed under conveyances from Cullom & Co., in which they asserted the validity of all the sales and conveyances mentioned in the bill; denied that the sale by Cullom & Co. to Hughes was fraudulent or pretended, or that Hughes bought at the mortgage sale as the agent of Cullom & Co., or for their benefit, or under any agreement or arrangement with them; averred ignorance of the charge that no money passed between Cullom & Co. and Hughes, and required strict proof thereof. They further averred, that the complainant, before the sale under the mortgage, consented that Cullom & Co. might become the purchasers at the sale; that he recognized the right of Cullom & Co. to the mortgaged premises, after the sale, as perfect and absolute, and performed work on the mill for them, and received from them payment for his work; and that their subsequent purchases from Cullom & Co. were induced by his acquiescence in the sale. They also set up these facts by way of plea in bar to the relief sought, and incorporated in their answer a demurrer to the bill, for want of equity, on account of the complainant's laches and delay, and on other grounds.

The answer of Cullom & Co. was as follows: "These defendants have read the answer of their co-defendants, and adopt the same as their answer, as well as the pleas and demurrers therein set forth. They expressly deny that said Hughes bought said lands and mill for them, but say that, after he bought the same, they agreed to take them from him. They further answer, that if said Hughes considered that he was buying the said premises for them, that it was expressly agreed between them and said complainant that they might, either by themselves or their agent, buy said lands at the mortgage sale; and they aver, that they endeavored, after their purchase from said Hughes, to get complainant to take said lands off their hands at the price it had cost them, and the amount due on the judgments they hold against him, as set forth in the answer of their co-defendants; but complainant utterly failed and refused so to do, and, on the contrary, consented to the sale of the

same to said Zeigler & Thompson, and delivered possession to them, and encouraged them, as the owners thereof, to go on and improve said mills, as he did these defendants while they owned the same, and received from them \$141 60 for labor performed on said mills. These defendants aver, that they derived no profit from said premises; that all the profits made while they owned said mill they allowed said complainant to receive, as a favor, under the hope that he would be able to redeem said land by a re-purchase from them, which he declined to do. These defendants deny all fraud and combination," &c.

The complainant took the deposition of said John W. Hughes, who testified as follows: "I bought the land at the instance of S. Cullom. Butler never said anything to me in regard to it. I can't detail the conversation with Cullom; but the substance of it was, that I was to purchase the land, and convey it back to Cullom & Co. Cullom made no further proposition to me than that I have just stated. I agreed to make the purchase according to that understanding. My reply was, that I would comply with their request. There was no further agreement. I have given the substance of the conversation, or understanding. I did not pay anything for the land, and nothing was paid to me in consideration of the re-conveyance." Several witnesses were examined on the part of the defendants, who testified to the value of the premises, the cost of re-building the mill, the value of the timber cut from the land, and the fact that the complainant, in re-building the mill, professed to act as the agent of Cullom, or of Cullom & Co.

On the final hearing, on pleadings and proof, at the spring term, 1867, the chancellor dismissed the bill, but without assigning any reason for his decree; and his decree is now assigned as error.

WATTS & TROY, for the appellant.

JOHN A. ELMORE, and W. P. CHILTON, *contra*.

BYRD, J.—The counsel for appellant, in their brief, remark, that they "are unable, after carefully examining the

record, to discover upon what ground the chancellor dismissed the bill." The cause was submitted for hearing upon the pleadings and proof. The answers contain a demurrer to the bill, and we presume that the chancellor dismissed the bill on the pleadings and proofs, as the 66th rule of practice requires a demurrer to be disposed of at the first term after it is filed, without waiting for the cause to be ready on the proof; and the record shows that the cause was continued after the demurrer was filed, and it does not show that any notice was ever taken of it by the counsel of the court. We do not, therefore, see proper to take any notice of the demurrer, upon an appeal by the complainant in the bill. Although the counsel have not discovered the ground upon which the bill was dismissed, nor the chancellor pointed out any; yet, if we can discover any upon which it ought to have been dismissed, it is just and reasonable to presume that he dismissed it upon that ground, or some other good ground which we have not detected.

1. It is apparent from the third and fifth sections of the bill, and from the whole scope of it, that the appellant denies the validity of the sale by Cullom & Co. to Hughes; and that he founds his right to the remedy he seeks, in part, upon the averment that that sale "was *pretended* and fraudulent;" and upon the charge, "that said sales from said S. Cullom & Co. to said Hughes, and from said Hughes to said S. Cullom & Co., and the conveyances executed by them respectively for said land, * * * were null and void." The evidence is not sufficient to satisfy us that the sale was fraudulent and void. The answers of the defendants are to be treated as mere pleading, as appellant waived their verification by oath. If they had been under oath, they would have been subject to a just and severe criticism, especially when their contents are compared with the evidence. As the appellant does not make out by proof that the sale by the mortgagees was fraudulent, the chancellor properly dismissed the bill, so far as any remedy was predicated on that ground.—*Pierce v. Brassfield*, 9 Ala. 573; *Cameron v. Abbott*, 30 Ala. 416; *Billingslea v. Ware*, 32 Ala.

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415; *Walthall v. Rives, Battle & Co.*, 36 Ala. 91; 38 Ala. 329; *Swift v. Swift*, 36 Ala. 147.

2. In the case of *Charles v. DuBose*, (29 Ala. 367,) this court notices, without deciding, the sufficiency of the allegation, in a bill seeking to set aside a sale, that "the defendant pretended there had been a sale." We do not intend now to intimate any opinion whether the frequent use of the word *pretended* in this bill meets the requirements of the rules governing pleadings in equity; but, as its use is of frequent occurrence in bills of late years, we merely refer to the following authorities on the subject: 1 Dan. Ch. Pr. 411-12, and notes; *Bliss v. Anderson*, 31 Ala. 612; Story's Eq. Pl. §§ 32, 241; *Spence v. Duren*, 3 Ala. 251; *Holman v. Bank of Norfolk*, 12 Ala. 369.

3. A trustee in a deed of trust, or a mortgagee, with a power of sale, may purchase at his own sale under the conveyance, and the sale is not void, but voidable at the instance of the beneficiary, if in any reasonable time he chooses to avoid it.—*Charles v. DuBose*, 29 Ala. 367; *Eastern Bank v. Taylor*, at June term, 1867. Conceding that the mortgagees were purchasers at their own sale, and that the bill seeks to set aside the sale on that ground; yet, under the authorities cited, and all the facts of this case, we are satisfied that the appellant did not apply within a reasonable time to have the sale set aside.—See, also, *Gentry v. Rogers*, 40 Ala.

The chancellor therefore committed no error in the decree rendered, and his decree is affirmed.

STUCKEY vs. BELLAH.

[TROVER FOR CONVERSION OF GOLD WATCH AND CHAIN.]

1. *Competency of party as witness.*—In trover against an administrator in his individual capacity, for the conversion of a chattel which the plaintiff claims under an alleged parol gift from the intestate in his life-time,

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and which the defendant holds and claims as assets of his intestate's estate, the plaintiff is not a competent witness to prove the alleged gift to himself. The case falls within the letter and spirit of the exception contained in the act approved February 14, 1867, entitled "An act in relation to the competency of witnesses," (Session Acts, 1866-67, p. 435,) which excepts from the provisions of said act "suits or proceedings by or against executors or administrators."

2. *Notice of filing interrogatories to witness; amendment of sheriff's return.* On motion to suppress the deposition of a witness before the commencement of the trial, on account of the failure to give notice of the filing of the interrogatories, the sheriff may amend his return, so as to show that notice was in fact given; and the return being thus amended, the motion to suppress may be overruled, although the return does not show when the notice was given, nor that it was given ten days before the deposition was taken.
3. *Proof of insolvency.*—In trover against an administrator individually, for the conversion of chattels which he claims as assets of his intestate's estate, he can not be allowed to prove that the estate is in fact insolvent, when it has not been declared insolvent.
4. *Competency of witness to testify as to mental capacity.*—A witness who "was intimate with the deceased, was a relative, and had stayed at his house for some time;" and a witness who "had known the deceased intimately for two years before his death, and was with him every day or two for a while before his death;" are both competent to testify as to the mental capacity of the deceased about the time of his death.

APPEAL from the Circuit Court of Dale.

Tried before the Hon. H. D. CLAYTON.

THIS action was brought by Samuel S. and Elizabeth C. Bellah, (who were husband and wife,) against John W. Stuckey, to recover damages for the conversion of a gold watch and chain, which the plaintiffs claimed under a verbal gift from Robert H. Stuckey, deceased, to Mrs. Elizabeth C. Bellah, (who was the mother-in-law of said Robert H. Stuckey,) and which the defendant held as assets of the estate of said Robert H. Stuckey, of which he was the administrator. The action was commenced on the 13th August, 1860; and the trial was had at the April term, 1867. The record does not show what pleas were filed.

"Before the trial was commenced," as the bill of exceptions states, "the defendant moved to suppress the deposition of Dorinda J. Snow, because it did not appear, on the face of the papers returned by the commissioner, that any notice had been given to the defendant, or his counsel, of

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the interrogatories to said witness. The court thereupon allowed the sheriff to endorse on the interrogatories to said witness, 'Received in office, and executed a copy upon the defendant.' Said entry was allowed, against the objection of the defendant, who insisted, that the commission and interrogatories of said witness must show, on themselves, the time when the commission issued, and the notice required by law. The court overruled the motion to suppress, and the defendant excepted.

"On the trial, the plaintiff offered herself as a witness, to prove that the watch, for the conversion of which the suit was brought, was given to her by Robert Stuckey, deceased. The defendant objected to the competency of said witness, because she was incompetent at the time the suit was brought, and because she was incompetent at the time of the trial, and because her testimony related to a transaction between herself and said deceased, as whose administrator the defendant justified. The court allowed the plaintiff to testify, against the said objections of the defendant; and the plaintiff thereupon testified, that said Robert Stuckey was her son-in-law, and was sick at her house, with a lingering disease; that on the Thursday before the Monday on which he died, he called her to him, while the family were at dinner, and told her to get his gold watch and chain; that she did so, and the deceased then gave them to her, saying that she had been very kind to him; and that no other person was present at the time. The defendant moved to exclude this evidence, because it related to a transaction between the plaintiff and said deceased, while he claimed the watch and chain under and by virtue of being the administrator of said deceased. The court refused to exclude the evidence, and the defendant excepted. The plaintiff further testified, that about the 20th February, 1860, the defendant called for the effects of the deceased; that some were given up to him; that she claimed the gold watch, and refused to give it up, and did not give it up until told to do so by her husband, and then under protest; that the defendant, some time afterwards, sold the watch and chain, as administrator of said deceased; that she and her husband forbade the sale; that the watch

and chain brought about sixty dollars at the sale, but were worth about one hundred and fifty dollars. To all of this evidence the defendant objected; but the court overruled his objection, and admitted the evidence; to which the defendant excepted. The plaintiff then introduced the deposition of Dorinda J. Snow, her daughter, who testified "to declarations of the deceased, as to his intention to give the plaintiff something for her kindness to him, and his desire that the watch should not go out of "the family;" also, as to the value of the watch, and the circumstances attending the delivery of it by the plaintiff to the defendant. "The plaintiff here closed, and no other evidence was introduced to prove the gift of the watch by the deceased to the plaintiff."

"The defendant introduced one W. H. Stuckey as a witness, who testified, that he was intimate with the deceased, was a relative, and had stayed at his house for some time; that he saw the deceased, about two weeks before his death, at the house of E. Middlebrooks; that the deceased was then in very feeble health, and did not know him, but revived before he left; that the deceased was weak, both mentally and physically, and was dying with consumption, or something of that character. The defendant proposed to ask said witness the mental condition of the deceased for some time before his death; to which the plaintiff objecting, the court refused to allow the witness to answer; to which the defendant excepted. The defendant also introduced one Thurmond as a witness, who stated, that he had known the deceased intimately, for two years before his death; that the deceased was, for some time before his death, in a very feeble condition of mind and body, and was childish and whimsical; that the deceased visited him, and stayed for several days at a time; and that he was with the deceased every day or two for a while before his death. The defendant asked said witness to state his opinion, as to the mental capacity of the deceased to dispose of his property, or for business; but, objection being made, the court refused to allow the witness to state his opinion.

"The defendant proposed to prove, that the claims against the estate of the deceased amounted to more than

the assets. The court refused to allow this, unless the estate had been declared insolvent ; to which ruling the defendant excepted."

All the rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

MARTIN & SAYRE, for appellant.

W. C. OATES, *contra*.

JUDGE, J.—The first section of the act of February 14, 1867, "in relation to the competency of witnesses," is as follows : "That in suits and proceedings before any court or officer in this State, other than criminal cases, there shall be no exclusion of any witness, because he is a party, or interested in the issue tried ; except that in suits or proceedings by or against executors or administrators, (as to which a different rule is not made by the laws of this State,) neither party shall be allowed to testify against the other, as to any transaction with, or statement by the testator or intestate, unless called to testify thereto by the opposite party."—Acts 1866-7, p. 435.

The defendant below was the administrator of the estate of Robert Stuckey, deceased, and, as such, had the possession of the watch and chain which are the subject of this suit, claiming them as the property of the estate of his intestate. The plaintiff claimed title to the watch and chain, by virtue of an alleged parol gift of the same to her, from Robert Stuckey in his life-time ; and she was permitted, against the objection of the defendant, to establish the parol gift by her own oath. Was she a competent witness, for that purpose, under the act of the legislature above referred to ?

The suit, it is true, was instituted against the defendant in his personal character. But the right of action, as the record discloses, was based upon an alleged conversion by him, in wrongfully withholding the property as belonging to the estate of his intestate. This made it, *within the meaning and intent of the statute*, a suit against an administrator. To exclude a witness occupying the relation contemplated by the statute, the phraseology of the act does

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not require that the suit or proceeding shall, in all cases, be by or against an executor or administrator, *in his representative character*. But when either party is an executor or administrator, and the estate represented by either is exclusively interested in the subject-matter of the suit, "neither party should be allowed to testify against the other, *as to any transaction with, or statement by the testator or intestate, unless called to testify thereto by the opposite party.*"

To place a different construction upon the act, would not, we think, be agreeably to the intent of the legislature; and the rule is well settled, that if, from a view of the whole law, the intent is different from even the literal import of some of its terms, the intent should prevail. Where property is held by one as the legal representative of a deceased person, he having obtained the possession of it as such representative, suit may be brought against him for the property, either in his personal or representative character. *Easley v. Boyd*, 12 Ala. 684. Therefore, the appellee in the present case could as well have sued the appellant as administrator, as to have instituted the action in its present form. Had the former course been pursued, it is too clear for controversy, that she would not have been a competent witness. Should the statute, then, receive such a construction as would place it within the power of a party plaintiff, in cases like the present, to avoid its positive mandate, at his own election as to the mere form of his remedy? An affirmative answer to this question would place us in conflict with the well-known rule of construction above stated, which requires effect to be given to a statute, according to its manifest intent—would be sacrificing the substance of the law to mere form. A sound public policy demands that the exception contained in the statute should be enforced. The living party should not have the advantage of being a witness, in his own case, against the estate of a dead man, when he offers himself to prove any transaction with, or statement by the deceased.

Our construction is supported by the adjudications of other States, upon statutes similar to our own. Section 310 of the Code of Ohio provides, that "no person shall be

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disqualified as a witness, in any civil action or proceeding, by reason of his interest in the event of the same, as a party or otherwise;" and section 313 of the same Code provides, that "no party shall be allowed to testify by virtue of the provisions of section three hundred and ten, where the adverse party is the executor or administrator of a deceased person, when the facts to be proved transpired before the death of such deceased person," &c. A residuary legatee, pursuant to a statute of the State of Ohio, had executed a bond, conditioned to pay all the debts of the testator, and suit was brought against the legatee upon this bond, by a creditor of the estate, based upon an alleged non-payment of his debt. Upon the trial, the plaintiff was sworn and examined as a witness in his own behalf, against the objection of the defendant. The supreme court of Ohio held, that the court below erred in permitting the plaintiff in the action to testify as to transactions which had occurred between him and the testator, against whose estate he was seeking to establish a claim, although the executor, as such, was not a party to the action. In their opinion, the court say: "Section 313 of the Code is in the nature of a statute against frauds and perjuries. The testimony of the party to the action, though generally admissible, is excluded, when it relates to transactions between him and a deceased person, against whose estate he asserts a claim. It was considered that there would be a temptation, in such a case, to fraud and perjury, against which protection should be given by excluding the testimony. The reason of the law certainly applies in this case with the same force as if the residuary legatee had given the ordinary bond, and been sued as executrix. The form which the remedy given to the creditors of the estate assumes, can properly make no difference."—*Stevens v. Hartley*, 13 Ohio, 525.

The reasoning of the court in the case above cited, applies with full force to the case at bar, and fully sustains the conclusion we have attained. See, also, the following authorities, which likewise, in principle, support our conclusion: *Kimball v. Estate of Baxter*, 27 Vermont, 628; *Fischer v. Morse*, 9 Gray, 440; *Ayres v. Ayres*, 11 Gray, 130; *Hubbard v. Chappin*, 2 Allen, 328.

2. Proceeding to consider the other questions presented by the assignments of error, we hold, that the court properly permitted the sheriff to amend his return, so as to show the service upon appellant of a copy of the interrogatories propounded to the witness, Dorinda J. Snow, and committed no error in refusing to suppress the deposition of said witness.

3. The appellant proposed to prove that the claims against the estate of Robert Stuckey, deceased, amounted to more than the assets of the estate. The court refused to allow this evidence to be introduced, unless the estate of the deceased had been declared insolvent; and in this ruling committed no error.

4. The facts deposed to by the witnesses, W. H. Stuckey and John Thurmond, relative to their acquaintance and intercourse with the deceased, Robert Stuckey, and his mental and physical condition, at or about the time of the alleged gift by him to the appellee, rendered it competent for each of said witnesses to give his opinion on the question of the mental capacity of the deceased to dispose of his property, at the time of the gift. We thus hold, upon the authority of previous adjudications of this court upon the question.—*Norris v. The State*, 16 Ala. 776; *In re Carmichael*, 36 Ala. 514, and cases there cited.

It results from what we have said, that the court below erred in its ruling relative to the competency of the appellee as a witness, and also in excluding the testimony of the witnesses Stuckey and Thurmond, as shown by the record.

Let the judgment be reversed, and the cause remanded.

DE JARNETTE vs. DE JARNETTE.

[SETTLEMENT OF ACCOUNTS OF RESIGNED TRUSTEE.]

1. *Commingling of trust funds and individual funds by trustee*.—If a trustee lends the trust funds, and takes a note and mortgage to himself individually, he thereby mingles the trust funds with his own individual funds, and may be charged with a *devastavit* at the election of the *cestuis que trust*. (The case of *Beasley and Wife v. Watson*, *ante*, pp. 234-41, explained.)

APPEAL from the Chancery Court of Autauga.
Heard before the Hon. JNO. Q. LOOMIS.

IN the matter of the final settlement of the accounts of William P. De Jarnette, as trustee for James T. De Jarnette. The trust was created by the will of John P. De Jarnette, deceased, which was admitted to probate, in the probate court of said county, on the 13th September, 1853. The will was dated the 9th December, 1848, and made provision for an equal division and distribution of the the testator's estate among his widow and children, of whom the said James T. De Jarnette was one; and a codicil to said will, dated the 16th August, 1853, was as follows: "It is my will and desire, that my friend Cornelius Robinson shall receive and hold all the property, of every decription, that is willed and bequeathed by me to my son James T. De Jarnette, and that the legal title to the same shall vest in him, the said Robinson; and that he shall hold it in trust for the use and benefit of my said son, James T. De Jarnette, and his wife, and such children as *is* now, and may be hereafter born to him; the profits of said property to be expended, as far as may be necessary, for their support and maintenance; and the said property not to be subject to the debts or contracts of the said James T. De Jarnette, and at the death of him, the said James T. De Jarnette, and his wife, to be equally divided among his heirs." The record does not show whether said Robinson ever accepted

the trust, nor does it show when the said William P. De Jarnette was appointed in his stead.

The said trustee filed his resignation, in the office of the register in chancery, on the 13th August, 1866; and the 10th November, 1866, was thereupon appointed by the register for the settlement of his accounts. On the settlement, the trustee asked to be allowed a credit for the amount due on a promissory note, executed by said James T. De Jarnette and his wife, dated the 9th January, 1861, and payable on the 1st January next after date, to said William P. De Jarnette or bearer; which note was secured by a mortgage on two slaves, belonging to the statutory separate estate of Mrs. De Jarnette, and contained a power of sale on default being made in the payment of the note at maturity. On the hearing before the register, as his report states, "it was admitted, that the sum of eight hundred and thirty-two dollars, part of the amount of said note, was trust funds, and the balance (\$286 18) was the amount which the trustee had paid out for family supplies for said James De Jarnette, in 1860, in excess of the interest due to the *cestuis que trust* for that year, and that the trustee had no other funds of said James T. De Jarnette in his hands except the said trust funds." The guardian *ad litem* of the infant *cestuis que trust* objected to the allowance of this note as a credit to the trustee, on the ground that the facts showed a conversion of the trust funds, which rendered the trustee personally liable for the loss of the money loaned. The register overruled the objection, and allowed the credit; but the chancellor sustained an exception to his report on this ground, and charged the trustee with the amount due on the note, and interest thereon; and this part of the chancellor's decree is now assigned as error.

Wm. H. NORTHINGTON, for appellant, cited 2 Story's Equity, 705; *Hart v. Ten Eyck*, 2 John. Ch. 76; *Thompson v. Brown*, 4 John. Ch. 619-29; *Booth v. Booth*, 1 Beavan, 129; *Crutchfield v. Haynes*, 14 Ala. 54.

C. S. G. DOSTER, *contra*, cited *Maury v. Mason*, 8 Porter,

211 ; *Raby v. Rideholgh*, 31 Eng. Law & Eq. 459 ; Lewin on Trusts, 337 ; Tiffany & Bullard on Trusts, 588.

A. J. WALKER, C. J.—A trustee loaned the funds of the trust, on note and mortgage executed to himself individually. This was a commingling of the trust funds with his own, and a destruction of their identification ; and therefore he is liable for their loss. This principle may work an individual hardship in this case ; but it is the law, long established, and recognized by the courts as “essential to the general interests of mankind.”—Lewin on Trusts, m. p. 296, 333 ; 2 Story’s Equity, § 1270 ; Fonblanque’s Equity, 474, n. ; *Freeman v. Fairlie*, 3 Merivale, 28 ; *Wren v. Katon*, 11 Vesey, 377 ; *Massey v. Banner*, 4 Mad. 413 ; *Fletcher v. Walker*, 3 ib. 73 ; *Routh v. Howell*, 3 Vesey, 565 ; *Verner’s Estate*, 6 Watts, 250 ; *Kellett v. Rathbun*, 4 Paige, 102 ; *Case v. Abeel*, 1 ib. 402 ; *Hart v. Ten Eyck*, 2 Johns. Ch. 108 ; *Mumford v. Murray*, 6 ib. 1 ; *Diffenderfer v. Winder*, 3 G. & J. 342 ; *Jameson v. Shelby*, 2 Hum. 198 ; Dayton on Surrogates, 489 ; 2 Lomax on Ex. 561, m. p. 341 ; Hill on Trustees, 376 ; *Ex parte Hilliard*, 1 Vesey, 89 ; *Roche v. Hart*, 11 Vesey, 61 ; *Ivey v. Coleman*, at the present term ; Tiffany & Bullard on the Law of Trusts & Trustees, 582 ; 2 Williams on Ex. 1546 ; *Pennell v. Deffield*, 23 Eng. L. & Eq. 460 ; *In the matter of Stafford*, 11 Barb. 353 ; 3 L. C. in Eq., m. p. 740, top 445 ; *West Br. Bank v. Fulmer*, 3 Penn. St. R. 390 ; *McAllister v. Commonwealth*, 30 Penn. St. 536 ; *Commonwealth v. McAllister*, 28 Penn. State, 480 ; 2 Lomax on Ex. 485 ; *Rogers’ Appeal*, 11 Penn. St. 36 ; *Matthews v. Brise*, 6 Beavan, 239 ; *Macdonall v. Harding*, 7 Sim. 5 ; *Stanley’s Appeal*, 8 Penn. St.

We do not mean to affirm, that when the investment is made in the individual name of the trustee, the *cestui que trust* may not follow the fund into the investment. All that we need decide, or do decide in this case, is, that the trustee is guilty of a *devastavit*, at the election of the *cestui que trust*.—*Pennell v. Deffield*, 23 Eng. L. & Eq. 460. It may be admitted, that such investment does not constitute a *devastavit*, until the election of the *cestui que trust* is signified.

This view would reconcile our position with the argument of the court in *Tompkins v. Reynolds*, 17 Ala. 109, 116.

The decree is affirmed.

JUDGE, J.—In the case of *Beasley and Wife v. Watson*, decided at the June term of this court, 1867, the guardian deposited in the Confederate States "Depository Office," at Eufaula, a sum of money belonging to his ward, to be funded in Confederate States four-per-cent. bonds, and took a certificate of the deposit in his own name as an individual, and not as guardian. On the final settlement, the introduction of this certificate in evidence by the guardian was objected to; and we held that it was properly admitted, inasmuch as it was competent to show by parol evidence, in connection with the certificate, that the investment had been made with the money of the ward. The question was not distinctly presented, though it may have been covered by the general objection made, that the guardian, by taking the certificate in his own name as an individual, had been guilty of a conversion of the fund, and that on that ground the ward elected to charge him with the amount of it; and no such question was presented, or argued, in this court. The point decided in that case, in this connection, therefore, was simply this: that it was competent to show by parol with what funds, and for whose benefit, the investment, under the circumstances, was made, which we still think it was clearly competent to do. The decision in the case of *Beasley and Wife v. Watson*, therefore, is not to be taken as an authority against the conclusion attained in the present case, which seems to be sustained by such an overwhelming array of authorities.

WALKER, C. J., and BYRD, J., assent to the explanation above given, in reference to the opinion in the case of *Beasley and Wife v. Watson*.

STEAMBOAT MIST *vs.* MARTIN, COWEN & CO.

[LIBEL IN ADMIRALTY AGAINST STEAMBOAT.]

1. *Admiralty jurisdiction, Federal and State.*—A demand for supplies furnished, in the port of Mobile, to a steamboat which is regularly licensed under the laws of the United States, enrolled at the custom-house in Mobile, and plying between that city and Columbus, Mississippi, and which belongs to a resident citizen of Mississippi, is a maritime contract, and can only be enforced, by admiralty process against the boat, in the Federal courts.

APPEAL from the City Court of Mobile.

Tried before the Hon. H. CHAMBERLAIN.

IN this case, a libel was filed by the appellees, on the 29th March, 1867, against the steamboat *Mist*, then lying in the port of Mobile, her tackle, apparel, &c. The libel was duly sworn to, and alleged that the libellants, "within six months last past, at the instance of the master and his agents, and during the time the said steamboat was navigating the waters of this State, sold and furnished to said steamboat victuals and supplies, amounting in the whole to the sum of one hundred and sixty-seven 87-100 dollars." A writ of seizure was thereupon issued, under which, on said 29th March, 1867, the sheriff took the boat into his possession. At the ensuing May term, 1867, M. B. Murphy, claiming to be the sole owner of the boat, filed a protest (or plea) to the jurisdiction, in these words: "Comes into open court M. B. Murphy," &c., "who says that, at the time the debt was made and contracted, the said steamboat *Mist* was engaged in navigation and commerce, between the city of Mobile, in the State of Alabama, and the city of Columbus, in the State of Mississippi; that she is an American vessel, was built at Pittsburg, in Pennsylvania, and was duly enrolled and licensed, in pursuance of the laws of the United States, at the custom-house in the city of Mobile, and that said license was in full force at the

time she was libelled in this case. Respondent therefore submits that this honorable court has no jurisdiction of said case, and prays that said libel may be dismissed," &c. To this plea, or protest, the libellants filed a demurrer, or "exceptive allegation," as follows: "For answer to the allegations contained in the answer, claim, and plea to the jurisdiction, filed by the claimant, M. B. Murphy, the libellants say, that said allegations are not true in fact, and that this court has jurisdiction in the cause; and further, that this court would have jurisdiction, if the said allegations in said plea were true; and that said plea, and the allegations thereof, are wholly insufficient, in that they do not set forth any sufficient facts, or causes, why this court has not jurisdiction." The decree recites, that the demurrer was sustained by the court; "and no answer having been filed, denying the allegations contained in said libel and petition, it is considered by the court that they are admitted to be true; and that the claim of Martin, Cowen & Co. has been sustained by proof, as a valid lien, to the amount of one hundred and sixty-two 52-100 dollars; for which they are allowed a decree, together with their costs," &c. To the rulings of the court in sustaining the demurrer, and in allowing libellants' claim as a valid lien on the boat, a bill of exceptions was reserved by the respondent and claimant.

"M. B. Murphy, the owner of the boat, testified," as the bill of exceptions states, "that she was built at Pittsburg, Pennsylvania; that he and one Mahan brought her to Mobile, in January, 1866; that she made a few trips on the Alabama river, when he purchased the entire interest in her; that he and Mahan were resident citizens of Mississippi; that he had been a resident citizen of Pascagoula, in Mississippi, for more than forty years, and was never a citizen of Alabama, and never resided here; that he bought the boat to run between Pascagoula and New Orleans, and put her in that trade until August, 1866, when he brought her to Mobile, at the request of Rutland & Co., and put her on the Alabama river, intending to run her there during the season of low water; that she never returned to Pascagoula; that she was registered in Mobile, and all her

papers were from the custom-house in said city; that he withdrew her from the Alabama river, in —, 1866, and put her in the trade between Mobile and Columbus; that she was continued in that trade up to a short time before she was libelled, but was lying at Mobile at the time Martin, Cowen & Co., who were grocery-merchants, supplied her with their bill of goods; that she was licensed and enrolled, under the laws of the United States, at the custom-house in Mobile; that he (said Murphy) resided at his home in Mississippi, but was occasionally in Mobile during the time said boat was running between Mobile and Columbus that he took charge of the boat himself, two or three days before she was libelled, and started away from the wharf about eleven o'clock at night, having no pilot on board, and without giving notice of his intention to the libellants, intending to run her to Pascagoula, so that he might put her out of their reach, and, when there, might make arrangements with them; that she was snagged on the obstructions in the bay of Mobile, when he ran her over to the eastern shore, about four hundred yards from the end of the wharf, at Montrose, in Baldwin county, where she was seized by the sheriff of Mobile county."

Other libels were filed against said steamboat, subsequent to that of Martin, Cowen & Co. The bill of exceptions states, that the pleadings were the same in all the cases; that the cases were consolidated, by consent, and tried together; that the court sustained its jurisdiction in each case, and allowed the claim of each libellant, so far as it was sustained by the proof; and that exceptions were reserved by the respondent and claimant to the rulings and decree of the court in each case.

The rulings and decree of the court are now assigned as error.

W. BOYLES, and GEO. N. STEWART, for appellant.—Under the pleadings and evidence in this case, the steamboat was a foreign vessel, being owned by a citizen of Mississippi, although enrolled at the custom-house in Mobile, and being engaged in navigation and commerce between Mobile, Alabama, and Columbus, Mississippi.—*Jackson v. The Magno-*

lia, 20 How. 296; 4 Wheaton, 443; 2 Story, C. C. 93; 1 Newberry's Adm. R. 189, 311, 313. The contract or demand sought to be enforced, under the pleadings and proof, is a maritime contract. Whatever doubts may have formerly existed on the question of jurisdiction in such cases, the recent decisions of the supreme court of the United States, which are binding on all the judicial tribunals of the country, have established the doctrine, that the jurisdiction of the Federal courts in all maritime cases, whether growing out of torts or contracts, is exclusive.—*The Moses Taylor*, 4 Wallace, 411; *The Hine v. Trevor*, 4 Wallace, 555; *The Mary Washington v. Ayres*, decided by Chase, C. J., and reported in 5th Amer. Law Register, 692.

R. H. SMITH, *contra*.—1. The Federal courts have exclusive, original jurisdiction, of all “civil causes of admiralty and maritime jurisdiction.” This jurisdiction can only be extended by act of congress, and within the limits of the constitutional grant.—1 Conkling's Adm. Pr. 6-12, and note; 10 Wheaton, 428. There has been much conflict of opinion and decision, as to the precise meaning of the words, “civil causes of admiralty and maritime jurisdiction.” The older decisions held, that these words applied only to contracts essentially to be performed on tide-waters, and services essentially maritime, or contracts essentially maritime in their nature.—10 Wheaton, 428; 7 Peters, 228, 344; 11 Peters, 175; 3 Sumner, 144, 149. The new cases go further, and say, that tide-water has nothing to do with the question of jurisdiction, provided the vessel is engaged in a maritime employment, and the contract is essentially maritime in its nature; that it extends in such cases, but in none others, to all the large navigable rivers.—*Do Lovio v. Boit*, 2 Gallison, 449; *The St. Lawrence*, 1 Black, 530; 11 Peters, 184; Conkling's Adm. Pr. 19-24, note b.

2. The question of this case, then, is, whether the contract sought to be enforced is maritime in its nature. Maritime contracts, or contracts of admiralty jurisdiction, are said by Judge Story to be, “such as relate to contracts for maritime services, in the building, repairing, supplying, and navigating ships.”—2 Gallison, 474. The ship also must

be engaged in a maritime employment.—21 Howard, 249; 11 Peters, 175. Even policies of insurance on ships are not of exclusive Federal jurisdiction.—2 Gallison, 475, 422. Admiralty jurisdiction does not extend to preliminary contracts, leading to the execution of maritime contracts.—3 Mason, 6; 1 Conkling's Adm. Pr. 31. The libellants in this case were not material men; their business was not confined to maritime matters, nor even principally with such matters. The contract was simply a personal credit for a few days, given to the owner, in the usual course of trade, by a firm who were grocery-merchants.

The distinctive features of an implied admiralty lien are—1st, that the vessel must be in a foreign port; 2d, the supplies must be shown to have been necessary and proper for the ship; 3d, the credit must have been necessary, and must have been given on the faith of the ship, and not of the owner alone.—1 Conkling's Adm. Pr. 74, 78–81; 3 Sumner, 228–36; 3 Kent's Com. (3d ed.) 163; 1 W. Rob. 309, 360; 19 Howard, 31, 359; 9 Wheaton, 409; Ware's R. 263, 275. Where the owner is present, though the vessel is in a foreign port, the credit is presumed to have been given to him, and no implied admiralty lien arises. The fact that the vessel is in a foreign port, though material in determining whether the creditor may proceed *in rem* or *in personam*, has nothing to do with the nature of the contract, nor with the question of admiralty jurisdiction. While the creditors in this case could allege and prove all the facts necessary to establish a lien under the laws of Alabama, they could not make out a case of which the Federal court would take jurisdiction, since that court will not enforce a lien given by a State law merely.

BYRD, J.—Until within a recent period, the received doctrine of the courts, State and Federal, has been, that the admiralty jurisdiction conferred by the constitution of the United States did not extend to the navigable rivers of a State above the tidal line, and to vessels navigating such waters *exclusively* above that line. As an illustration, the Tennessee river is navigable from Decatur, Alabama, above the shoals, to Chattanooga, Tennessee, and vessels navi-

gating that portion of the river can not reach tide-water, on account of natural obstructions in the river; now it seems to me, that the mere grant of maritime and admiralty jurisdiction to the courts of the United States did not confer jurisdiction to them over a vessel navigating that portion of the Tennessee river described, nor give them jurisdiction over every contract or tort made or committed by such vessel. Nor do I know of any authority of any country in which the civil or common law prevailed at the time of the adoption of the Federal constitution, which would support the doctrine, that the jurisdiction of courts of admiralty extended to vessels navigating the rivers of a country exclusively above tide-waters.

At the time the act of congress of the 26th February, 1845, was passed, I do not think any one supposed that the act was based on the grant in the constitution of admiralty and maritime jurisdiction to the courts of the United States; or that the courts themselves had such jurisdiction over the rivers of the north-west. But that act was predicated on the grant to congress of the power to regulate commerce between the States, which is a distinct and independent grant from that of admiralty and maritime jurisdiction to the Federal courts. Hence, I can not see how the act of 1845 was any restriction of the jurisdiction of the courts under the judiciary act of 1789; as it seems the learned chief-justice holds in the case of *The Washington v. Ayres et al.*, 5 Law Register, 692; and that therefore the case of *Allen v. Newberry*, (21 Howard, 244,) is consistent with late adjudications, which hold that, under the judiciary act of 1789, the Federal courts have jurisdiction over all contracts and torts of vessels plying exclusively on the rivers of a State. The act of 1845 was intended to *enlarge*, not to *restrict*, the jurisdiction of the national courts.

In the case of *The Belfast v. Boon et al.*, (at the last term,) we held, that a contract of affreightment, made and to be performed *within* the State, and upon a river of the State, was not a maritime contract, and that by the maritime law the shipper had no lien on the boat for the goods shipped, if lost or destroyed. An appeal has been taken in that case, to the supreme court of the United States.

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For over sixty years after the constitution was adopted, the almost uniform decisions of the State and Federal courts held, that the States, as to river navigation exclusively within their respective boundaries, had concurrent admiralty jurisdiction with the courts of the national government, and in some cases exclusive jurisdiction; and State legislation has for the same time been consistent with this doctrine.—*Allen v. Newberry*, 21 Howard, 244; and cases cited in *Belfast v. Boon*, *supra*. But late adjudications of the highest court in this country have departed from this doctrine, and, perhaps wisely, denied to the States any jurisdiction in such causes.

From the libel and the evidence in this cause it appears, that the claim of appellees is founded on a *maritime* contract, which is attempted to be enforced in a State court. Abbott on Shipping, m. p. 148, n. 1, and authorities there cited. It is therefore distinguishable from the case of the *Belfast v. Boon*. The plea to the jurisdiction of the court, under the decisions of the supreme court of the United States, was well taken, and fatal to the proceeding.—*The Hine v. Trevor*, and *The Moses Taylor*, 4 Wallace.

Hence, the judgments of the court below, in favor of the several parties, must be reversed, and the cause remanded. See authorities cited on brief of counsel. Whether *such a proceeding* could not be sustained, for materials furnished to a purely domestic vessel, or for liabilities incurred on account of or for a vessel, for which no lien is given by the maritime law, or to which the jurisdiction of courts of admiralty did not extend, where a lien is given by the statute law of a State for the payment of such materials or liabilities, and a mode is prescribed for its enforcement in the nature of an admiralty suit, is a question which it is unnecessary to decide, as this vessel was not purely a domestic one, but belonged to a citizen of another State, and was on its way to another State when it was libelled and seized.

Reversed and remanded.

PAGE AND WIFE *vs.* MATTHEWS' ADM'R.

[SALE OF DECEDENT'S LANDS, BY PROBATE COURT, FOR DIVISION.]

1. *Sufficiency of petition, in describing heirs.*—A petition for the sale of a decedent's real estate, for the purpose of making an equitable division among his heirs-at-law, (Code, § 1863,) which states the names of all the heirs, describing four of them as minors, and two of them as married women, but not averring whether the latter and their husbands are of full age or not, is fatally defective on error. (WALKER, C. J., expressing no opinion.)
2. *Notice to heirs.*—If any of the heirs, in such proceeding, are married women, the statute imperatively requires that the citation must be served on their husbands, (Code, § 1870,) as well as on them.

APPEAL from the Probate Court of Russell.

IN the matter of the estate of Matthew Matthews, deceased, on the application of Milton J. Moore, the administrator, for an order to sell the real estate of which said decedent died seized and possessed. The petition was filed on the 21st September, 1864; alleged that the lands could not "be equitably and fairly divided among the distributees of said estate, after the widow's dower is allotted to her, without a sale of the same;" and described the heirs-at-law as follows: "The distributees of said estate are named—1st, Rutha Matthews, the widow; 2d, Revella V. Moore, the wife of Milton J. Moore; 3d, Rutha F. Page, the wife of John R. Page, jr.; 4th, Mary E. Matthews, a minor; 5th, Pocahontas Matthews, a minor; 6th, Martha J. Matthews, a minor; 7th, Emma L. Matthews, a minor." On the filing of the petition, the court appointed a guardian *ad litem* to represent the interests of the infants, directed citation "to be issued to him and the heirs resident," and set the second Monday in November following for the hearing. A citation was issued on the same day, which commanded the sheriff to notify "Rutha Matthews, R. V. Moore, wife of M. J. Moore, and R. F. Page, wife of John

R. Page;" and which was returned by the sheriff, "executed, October 27, 1864." On the hearing, (November 14, 1864,) the court granted an order of sale, which recites that citation had been served, "and publication made, as prescribed at a former term of the court;" but does not show that any of the parties appeared. The sale was made by the administrator on the 2d January, 1865, and was reported to the court, under oath, on the 9th January; the widow, the administrator, and said John R. Page, being the principal purchasers. The court confirmed the sale of a portion of the land, but set aside the sale of the residue, on account of the inadequacy of the price, and ordered a re-sale of that part. The re-sale was made on the 30th January, 1865, was duly reported to the court, and confirmed on the 3d February, 1865. The appeal was sued out by John R. and Rutha F. Page, on the 25th June, 1866, "from the final decree rendered at the November term, 1864, ordering a sale of said lands;" and that decree is now assigned as error.

GEORGE D. & G. W. HOOPER, and GOLDTHWAITE, RICE & SEMPLE, for the appellants.

STONE, CLOPTON & CLANTON, *contra*.

JUDGE, J.—In *Cloud and Wife v. Barton*, (14 Ala. 347,) it was held, that a petition by an administrator, for the sale of land of his intestate, which stated that Anne R. Cloud, the wife of N. B. Cloud, was the sold child and heir-at-law of W. B., deceased, and that she resided near Tuskegee, in the State of Alabama, with her husband, was insufficient to authorize the orphans' court to decree a sale of the land, *as it did not specify the ages of the heir-at-law and her husband*. This adjudication was made under the influence of the statute of 1822, which, with a single exception not necessary to be here named, was in substance the same as section 1868 of the Code, under which the present application was made; each statute requiring it to be stated in such an application which, if any, of the heirs or devisees are under the age of twenty-one years.

It is stated in the application before us, that Revella V.

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Moore, and Rutha F. Page, the wives respectively of Milton J. Moore and John R. Page, are "distributees of the estate;" but the ages severally of the husbands and wives are not stated. It is also averred that four of the "distributees," who are described by name, are minors. This averment of the minority of four of the parties, is not a statement, by legal implication even, that the two married women and their husbands, whose ages are not given, are adults; and it has been the established doctrine of this court, for nearly thirty years, (and we are not aware that it has ever been departed from, in a direct proceeding on error or appeal,) that, as the statute under which such a proceeding is had, is explicit in declaring what must be stated in the application, its terms are to be regarded as imperative.—*Griffin v. Griffin*, 3 Ala. 623. See, also, *Hoard v. Hoard's Adm'r*, at the present term.

2. Another defect in the proceedings below is as follows: Section 1870 of the Code requires, that, "if any of the heirs or devisees are married women, the citation must be served on the husband, as well as the wife." This provision of the Code was not complied with; and nothing appears in the proceedings to cure the omission, in so far as the husband Page is concerned.

For the errors pointed out, the decree of sale must be reversed, and the cause remanded.

Chief-Justice WALKER agrees, that there must be a reversal in this case, on account of the want of notice to the husbands of the married women. Upon the other point, a decision is not, in his judgment, necessary, and he remains uncommitted as to it. He has no doubt that it must be shown whether the distributees are infants; but he is inclined to think that the petition, construed as such instruments ought to be, when not objected to in the court below, shows which are infants, and which are adults.

TARLETON vs. SOUTHERN BANK OF ALABAMA.

[ACTION ON BILL OF EXCHANGE, BY ENDORSEE AGAINST DRAWER.]

1. *Proof of consideration of bill, and of parol agreement for discharge in Confederate treasury-notes; admissibility of.*—In an action by an endorsee, against the drawer of a bill of exchange, or bank-check, which was drawn by a bank in Mobile, on a bank in New Orleans, in August, 1862, (after the capture of New Orleans by the Federal forces,) “payable in currency,” and which was not presented to the drawee until after the close of the late war; it is permissible for the defendant, under the provisions of the third section of the ordinance (No. 26) adopted on the 28th September, 1865, to prove “that it was understood and agreed between the bank and said B. [payee], at the time of drawing the bill, that, if it could not be sent to New Orleans in a short time, it should be returned to the bank, and the same amount of money that B. had paid for it, which was Confederate treasury-notes, should be returned to him;” and evidence which tends to show that, at the time the plaintiff purchased the bill, this agreement was communicated to him by the payee, is also competent and admissible for the defendant. (BYRD, J., *dissenting*.)
2. *Ordinance No. 26, adopted September 28, 1865, admitting parol evidence of consideration of Confederate contracts; constitutionality and validity of.*—The third section of the ordinance adopted by the State convention on the 28th September, 1865, (No. 26,) so far as it declares that, “in all suits upon contracts made between the 1st September, 1861, and the 1st May, 1865, parol evidence shall be admissible to prove what was the consideration thereof, and whether or not the parties thereto understood or agreed that the same should be discharged by a payment in Confederate currency or treasury-notes,” simply changes a rule of evidence, as the legislative power might lawfully do, and does not impair the obligation of contracts within the meaning of the constitutional prohibition. (BYRD, J., *dissenting*.)

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by George W. Tarleton, against the Southern Bank of Alabama; was commenced on the 7th September, 1865; and was founded on a bill of exchange, or bank-check, of which the following is a copy :

"Southern Bank of Alabama, Mobile, Aug. 26, 1862.

"Louisiana State Bank, New Orleans :

Pay this, my first check,
(second unpaid,) to the order of Alfred Batre, No. 6,715,
eleven thousand (payable in currency) dollars."

"\$11,000." (Signed) "DAN'L C. SAMPSON, Cash'r."

Endorsed, "Alfred Batre."

The complaint contained two counts. The first count claimed of the defendant eleven thousand dollars, "due on a bill of exchange drawn by said defendant, on the Louisiana State Bank at New Orleans, in favor of the order of A. Batre, on demand, in currency, and bearing date, Mobile, August 26, 1862; which said bill was endorsed and delivered to plaintiff by said Batre, and was afterwards duly presented to said drawee, and protested for non-payment; of all which said defendant had due notice." The second count was in these words: "Plaintiff claims of defendant, also, the further sum of eleven thousand dollars, due on a certain other bill, or check, drawn by defendant on the Louisiana State Bank at New Orleans, for the sum aforesaid, in favor of A. Batre, or order; dated August 26, 1862, payable on presentation, and which was delivered by defendant to said Batre, and by him endorsed and delivered to the plaintiff. And plaintiff avers, that, at the time of the drawing of said bill, and for a long time afterwards, war existed between the United States and the (then) Confederate States of America; that the city of New Orleans, the locality of said drawee, was in the occupancy of the United States, and the city of Mobile (the residence of all the parties to said bill and the plaintiff) in the occupancy of the Confederacy; and that all intercourse, of every kind, between citizens of the two places, was prohibited by both governments. As soon, however, as peace prevailed, and intercourse between the two places, and plaintiff could legally present said bill, to-wit, on the 11th day of May, 1865, he caused the same to be presented for payment to said drawee, who refused to pay the same; whereupon, the same was duly protested for non-payment; of which defendant had due notice." No objection was interposed to

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the complaint. The defendant pleaded "the general issue, in short by consent;" and issue was joined on that plea.

On the trial, at the January term, 1866, as the bill of exceptions shows, the plaintiff read in evidence the bill of exchange, or check, on which the action was founded, with the protest thereof; "to the reading of which no objection was made." "The plaintiff then proved, that, before the drawing of said bill, New Orleans was in the possession of the Federal forces, who continued to hold it until the end of the war; that Mobile was taken by the Federal forces on the 12th April, 1865, but trade was not opened immediately, nor for a month or six weeks afterwards; though permits were granted by the commanding officers, to some persons, to introduce goods, which were mostly brought in government vessels; that some persons were allowed to go to New Orleans, on passports, but others, who applied for such passports, were refused. The defendant then introduced Daniel C. Sampson as a witness, who was the cashier of the bank, and who testified, that the bank sold the bill to Batre at a premium of thirty per cent.; that the bank, at the time of drawing the bill, had funds in the Louisiana State Bank at New Orleans, to the amount of nineteen thousand dollars; that those funds remained in said bank at New Orleans, until September, 1863, when the same was seized by the United States government, who still hold the same, though the defendant is petitioning the government for its return. The defendant then offered to prove, by said Sampson, that it was understood and agreed between the defendant and said Batre, at the time of drawing said bill, that, if the bill could not be sent to New Orleans in a short time, it should be returned to the bank, and the same amount of money that Batre had paid for it, which was Confederate treasury-notes, should be returned to him. To this testimony of Sampson, as to the oral agreement, the plaintiff objected, but his objection was overruled; to which the plaintiff excepted.

"The defendant then introduced said Batre as a witness, who testified, that the bank informed him that they had exchange on New Orleans for sale; that he, being a broker,

offered to sell exchange on New Orleans to Tarleton, who agreed to buy from him eleven thousand dollars, at thirty-five per cent. premium; that he then went and bought the bill from the bank, and immediately sold it to Tarleton, at a premium of thirty-five per cent., and received the money from him when he handed him the bill. The defendant then asked Batre, if he communicated to Tarleton the agreement between himself and the bank; to which Batre answered, that he remembered no agreement about the bill, further than that Sampson, at the time of drawing the bill, said that the bank wished it sent to New Orleans as soon as it could be done; that he communicated this to Tarleton, but did not remember to have communicated any more, and did not remember any more that was said by Sampson; but that he communicated to Tarleton all that Sampson said to him. To the portion of Batre's testimony showing that he told Tarleton the bank wanted the bill sent to New Orleans as soon as possible, and that he told Tarleton all that Sampson told him, the plaintiff objected, but his objection was overruled; to which the plaintiff excepted.

"After the argument had commenced, the plaintiff again moved the court to exclude from the jury that portion of Sampson's testimony objected to, and that portion of Batre's testimony objected to; and excepted to the refusal of the court to exclude it. In consequence of the ruling of the court in admitting that portion of Sampson's testimony objected to, and in not afterwards excluding it from the jury, the plaintiff took a nonsuit, with a bill of exception."

The rulings of the court on the evidence, as above stated, are now assigned as error.

E. S. DARGAN, for appellant.

SMITH & HERNDON, *contra*.

(No briefs have come to the Reporter's hands.)

A. J. WALKER, C. J.—The trial in the court below resulted in a nonsuit, taken by the plaintiff in consequence of rulings upon questions of evidence. We shall restrict this opinion to those questions. The bill of exchange, which is the subject of suit, was drawn at Mobile, in August,

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1862, by the Southern Bank of Alabama, on a party in New Orleans, in favor of Alfred Batre, who endorsed it to the plaintiff. At the date of the bill, the two cities of Mobile and New Orleans were in the possession of antagonistic belligerents, *flagrante bello*. That fact is proved, as an excuse for the delay in the presentation to the drawee, which was not made until the war closed. The defendant then offered to prove, by said Sampson, "that it was understood and agreed between the defendant and said Batre, at the time of drawing said bill, that, if the bill could not be sent to New Orleans in a short time, it should be returned to the bank, and the same amount of money that Batre had paid for it, which was Confederate treasury-notes, should be returned to him." The exception to the admission of this testimony presents the material question to be decided by us.

An ancient and well-known principle forbids the introduction of parol evidence, which effects an alteration of a written contract. This rule, touching the remedy only, is subject to legislative control. The convention, exercising the legislative power of the State, on the 28th September, 1865, adopted an ordinance, the third section of which abolished that rule, to a limited extent, as to a certain class of contracts. That section is in the following words: "In all suits upon contracts made between the first of September, 1861, and the first of May, 1865, parol evidence shall be admissible to prove what was the consideration thereof, and whether or not the parties thereto understood or agreed that the same should be discharged by a payment in Confederate currency or treasury-notes; and if so, or if it appears so from the contract, then to show what was the true value of the consideration of the said contract, and what amount the plaintiff is legally, justly, and equitably entitled to receive according to the contract, by the judgment of the said court."

It is certain that, under this section, parol evidence is admissible for two purposes: first, to show the consideration of the contract; and, secondly, to add to the contract, as expressed in writing, a stipulation that it might be discharged in Confederate currency or treasury-notes. As to

its admissibility to a farther extent, or for other purpose, we are not required to say anything. The testimony above quoted states, that the bill of exchange was given for Confederate treasury-notes. It therefore had an immediate bearing upon the point of the consideration. The remainder of the testimony showed, or tended to show, an agreement that, in the event the bill could not be sent to New Orleans in a short time, it should be returned, and discharged with like money. We intend no intimation as to the sufficiency or insufficiency of the evidence. Our purpose is accomplished by ascertaining the tendency of the evidence, and we inquire no farther. This evidence, bearing upon the question of an agreement for the discharge of the bill in Confederate treasury-notes, was, under the ordinance, admissible. It was permissible for the defendant to show that the consideration was Confederate currency, and that there was an agreement for its discharge, in a specified contingency, in like money. The evidence being relevant to these points, it was admissible.

If Batre agreed that, in the contingency of an inability to send the bill to New Orleans in a short time, he would return the bill for discharge by the bank in Confederate treasury-notes, the contract, as modified by the parol evidence, was alternative. In the specified contingency, it was Batre's duty to return the bill, and to afford an opportunity for its discharge according to the agreement; and there was a corresponding right in the defendant.

The other evidence, to the admission of which exception was taken, was admissible in the point of view which we have presented.

While we intend to express no opinion upon the question, whether Tarleton was a holder with notice of the defensive matter, we remark, that there was evidence touching it, which it was proper to leave to the consideration of the jury.

The foregoing is the opinion at first delivered in this case. Since its delivery, a re-hearing has been granted, upon the petition of the able counsel for the appellant. A re-examination of the subject has confirmed us in the opinion above

expressed. The learned counsel contends, that if a contract specify a particular currency, or money, in which payment is appointed to be made, it is incompetent to prove a conflicting agreement or understanding for payment in Confederate treasury-notes; and if the ordinance of the convention be understood to authorize such proof, that it impairs the obligation of contracts. It is conceded that, at common law, such proof would be inadmissible. Why would it be inadmissible? Simply because a rule of evidence intervenes to prevent the ascertainment of the contract, if it was variant from the written instrument. The ordinance therefore designs, by a change in the rules of evidence, to assist in the ascertainment of what the contract really was, and does not interfere at all with its obligation. It is well settled, that a change in the rules of evidence does not impair the obligation of contracts.—*Scheible v. Bacho*, at the present term; *Ex parte Pollard*, 40 Ala. 77; *Bloodgood v. Cammack*, 5 St. & P. 276; *Bartlett v. Lang*, 2 Ala. 401.

It is also contended, that to allow the defense set up in this case would impair the rights of an innocent holder of a bill of exchange for a valuable consideration, and let in a defense to the instrument in his hands, which was not by the law available against him; and that therefore the ordinance, in its effect upon this case, impairs the obligation of the contract, as between the drawer and innocent endorsee. This question does not arise in this case. The court ruled in favor of the admissibility of certain testimony, and the plaintiff thereupon took a *nonsuit*. We are therefore only to decide upon the admissibility of the evidence. The question would arise, if it appeared conclusively that the plaintiff was an innocent endorsee. It does not so appear. There was such evidence as required a reference of the question of innocent holder to the jury. A witness (Sampson) proved the contract as herein before stated; and there was evidence from which it might have been argued before the jury, with what correctness it is not for us to say, that this contract was communicated to the plaintiff. As it was a question in the case whether the

plaintiff was an innocent holder, it was right, conceding the point of law above stated to be correct, to admit the evidence.

The judgment is affirmed.

BYRD, J., dissenting, without committing himself in favor of any of the points made in the opinion of the court.

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1. *When action lies against county, for damages caused by fall from public bridge.*—To sustain an action against a county, for damages caused by a fall from a public bridge, which had been erected under contract with the court of county commissioners, (Code, § 1203,) the complaint must aver, either that no guaranty was taken, or that the period fixed by the guaranty, if one was taken, had expired before the injury happened: if a guaranty was taken, its insufficiency to afford adequate compensation to persons injured does not render the county liable to an action.—*Barbour County v. Horn*..... 114
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3. *Same.*—A count, which avers, that the note was made by a corporation, “by said defendant as its agent,” payable at a banking-house, to the order of the defendant, and by him endorsed to the plaintiff; that the defendant “was the sole agent of said corporation at the maturity of said note, and no other person was authorized to pay said note for said corporation; wherefore plaintiff avers, that said defendant had due notice of the non-payment of said note at maturity,”—is not sufficient, as a count against the endorser of a note governed by the commercial law, because it does not aver notice of non-payment, nor contain allegations which dispense with the necessity of notice.—*S. C.* 207
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- that it was in fact so received, a recovery cannot be had on the original debt.—*S. C.* 222
7. *Authority of partner, after dissolution, to sign partnership name to note for partnership debt.*—After the dissolution of a partnership, one of the partners has no authority to bind the others, by signing the partnership name to a promissory note, even though such note may be given in renewal of a former note executed by the partnership; and the fact that, on the dissolution, he was authorized by the other partners to settle all the partnership business, does not change or affect this principle.—*S. C.* 222
8. *Burden of proof, as to liability of partner on promissory note executed in partnership name.*—A promissory note, executed by one partner, during the existence of the partnership, and in the name of the partnership, is, *prima facie*, binding on the other partners, and throws on them the *onus* of disproving their liability: and this principle is applicable to limited partnerships.—*Jemison & Sloan v. Dearing's Executors.* 283
9. *Variance in description of note.*—Under a complaint, in the form prescribed by the Code, for an action “by payee against maker,” (p. 551,) charging the defendants as joint makers of a promissory note, a recovery may be had on proof of a note signed by them as partners, or executed by one of them, during the existence of the partnership, and in the partnership name.—*S. C.* 283
10. *Liability of hirer, on note given for hire of slave.*—The maker of a promissory note, given for the hire of slaves, may be liable thereon, although the slaves never went into his possession, since his failure to receive them may have been caused by his own refusal, and not by the fault of the owner.—*S. C.* 283
11. *Proof of consideration of bill, and of parol agreement for discharge in Confederate treasury-notes; admissibility of.*—In an action by an endorsee, against the drawer of a bill of exchange, or bank-check, which was drawn by a bank in Mobile, on a bank in New Orleans, in August, 1862, (after the capture of New Orleans by the Federal forces,) “payable in currency,” and which was not presented to the drawee until after the close of the late war; it is permissible for the defendant, under the provisions of the third section of the ordinance (No. 26) adopted on the 28th September, 1865, to prove “that it was understood and agreed between the bank and said B. [payee], at the time of drawing the bill, that, if it could not be sent to New Orleans in a short time, it should be returned to the bank, and the same amount of money that B. had paid for it, which was Confederate treasury-notes, should be returned to him;” and evidence which tends to show that, at the time the plaintiff purchased the bill, this agreement was communicated to him by the payee, is also competent and admissible for the defendant. (*BrED, J., dissenting.*)—*Tarleton v. Southern Bank of Alabama.* 722

BONDS.

1. *Validity of bond or guaranty of contractor for building public bridge.*
Where a contract for the building of a public bridge is made by

BONDS—CONTINUED.

- the court of county commissioners, and the contractor is required by such court to give bond or guaranty for the sufficiency of his work, (Code, § 1203,) a bond or guaranty executed by him, in pursuance of such requisition, is not void because taken by the probate judge; nor because it is made payable to the probate judge and his successors in office.—*Barbour County v. Horn*..... 114
2. *Replevin bond for delivery of slaves taken under attachment; excuse for non-performance.*—The condition of a replevin bond, executed in 1859, for the forthcoming of slaves taken under attachment, having become, by the abolition of slavery before forfeiture, both illegal and impossible of performance, the surety is discharged from all liability.—*Glover v. Taylor & Co.*..... 124
3. *Forthcoming bonds in detainee cases, and under 3d section of "stay law" of February 8, 1861.*—Where the complaint in an action of detainee, instituted in April, 1861, is in the form prescribed by the Code, (p. 552,) "for the recovery of chattels in specie;" while the forthcoming bond taken from the defendant, instead of being conditioned as required by section 2192 of the Code, is drawn in pursuance of the provisions of the third section of the act approved February 8, 1861, commonly called the "stay law," (Session Acts, 1861, p. 4,) there is no statute which gives to the bond, when returned forfeited, the force and effect of a judgment, or authorizes the issue of an execution on it.—*Rose v. Pearson*..... 253
4. *Title-bond of deceased vendor; Tennessee statute of 1794.*—The provision in the Tennessee statute of 1794, which declares that an executor or administrator "shall not be bound to make title" to lands sold by the decedent in his life-time, "until the bond or obligation of the decedent shall have been recorded in the county in which the land lies," &c., relates merely to the remedy for the enforcement of the contract, and, therefore, constitutes no defense to an action here for a breach of such title-bond; but the subsequent provision of that statute—"nor shall the holders of such obligations charge the personal estate of such decedent, until they shall have produced the obligation, duly authenticated," &c.—affects the validity of the contract sought to be enforced, and a failure to comply with it is a complete bar to such action.—*Swink's Adm'r v. Dechard*..... 258

CHANCERY.

I JURISDICTION.

1. *Specific performance of parol contract for sale of lands.*—A parol contract for the sale of lands is not taken out of the operation of the statute of frauds, on the ground of partial performance, where the facts relied on, as constituting a part payment of the purchase-money, simply show that the purchaser furnished to the company present, "as a treat," five drinks of liquor, which were worth at the time five dollars in Confederate currency, and the contract itself did not require any cash payment.—*Hart v. McMillan*..... 251
2. *Parol voluntary trust in slaves enforced against purchaser with*

CHANCERY—CONTINUED.

- notice.—Where slaves are conveyed by a father to his reputed daughter, in consideration of natural love and affection, by deed of gift absolute on its face, but under a parol trust that the grantee shall, within a specified time, convey them to her children, the trust may be enforced in equity, at the instance of the children, after the death of the grantor, against one who purchased from the grantee with notice of the trust.—*Jones' Adm'r v. Shaddock*..... 262
3. *Liability of such implied trustee*.—The purchaser in such case, if he allows the slaves to hire their own time, and acquire money or property for themselves, is not bound to assert title to such acquisitions ; yet, if he does assert title thereto, he holds such acquisitions for the benefit of the *cestuis que trust*, and is chargeable with the same at their instance.—*S. C.*..... 262
4. *Same*.—If he sells a negro to one of the slaves held by him under such trust, and receives in payment money arising from the slave's earnings, the title to the negro so sold does not thereby pass from him, but he holds the money subject to the trust.—*S. C.*..... 262
5. *Purchase by agent at his own sale*.—An agent, having authority to sell, may purchase from himself ; and such purchase will be valid against all the world, except the principal, who may set it aside within a reasonable time.—*Eastern Bank of Alabama v. Taylor*... 93
6. *Purchase by trustee at his own sale*.—A trustee, under a deed of trust for the benefit of creditors, may become the purchaser at his own sale ; but such purchase and sale may be set aside, on the timely application of the beneficiaries in the deed.—*Carter v. Thompson*..... 375
7. *Same*.—A purchase by a trustee or mortgagee, at his own sale, is not void, but voidable only, at the instance of the *cestui que trust* or mortgagor, expressed within a reasonable time ; and under the circumstances of this case, (the bill not having been filed until after the lapse of more than four years and a half,) the delay was held fatal to the relief sought.—*Robinson v. Culloin & Co.*..... 693
8. *Commingling of trust funds and individual funds by trustee*.—If a trustee lends the trust funds, and takes a note and mortgage to himself individually, he thereby mingles the trust funds with his own individual funds, and may be charged with a *devastavit* at the election of the *cestuis que trust*. (The case of *Beasley and Wife v. Watson*, ante, pp. 234-41, explained.)—*De Jarnette v. DeJarnette*. 708

II. PLEADINGS AND PRACTICE.

9. *Parties to bill for specific performance*.—A bill which is filed by a purchaser, against his vendor and another, to compel the specific performance of a contract for the sale of lands, and which shows on its face that the vendor derived title under a sale made by himself, as trustee, under a deed of trust executed by his co-defendant to secure a specified debt, must aver that the secured debt has been paid, or must make the owner of that debt a party ; but, if the bill only seeks to divest out of the vendor such title as he acquired by his purchase at the sale, the creditor is not a necessary party.—*Carter v. Thompson*..... 375

CHANCERY—CONTINUED.

10. *Certainly requisite in allegations of bill.*—Authorities cited as to the sufficiency of an averment that a sale was *pretended*, in a bill seeking to set it aside.—*Robinson v. Cullom & Co.*..... 693
11. *Offer to do equity.*—A tax-payer, seeking to enjoin the collection of a tax imposed by a municipal corporation, can not obtain equitable relief on account of an excess of taxes, unless he offers in his bill to pay the amount admitted to be justly due.—*Mayor and Aldermen of Mobile v. Waring*..... 139
12. *Tender.*—A mortgagor, asking a redemption, cancellation of the mortgage, &c., on the ground of a tender made and refused, must pay into court, at the time of filing his bill, the amount of money admitted to be due, and make an appropriate averment in his bill as to such payment; otherwise, his bill is without equity.—*Daughdrill v. Sweeney* 310
13. *Averment of performance, or readiness and willingness to perform.* A purchaser, asking the specific performance of a parol contract for the sale of lands, must aver in his bill the facts showing a full compliance on his part with all the stipulations of the contract: a general allegation, "that he has offered, and has always been ready and willing to comply with his contract," not stating the facts, is not sufficient.—*Hart v. McMillan*..... 251
14. *Same.*—A purchaser, seeking a specific performance by his vendor or other relief in the nature of a specific performance, must aver in his bill that he has requested his vendor to make title according to the condition of his bond, or must show some excuse for his failure to do so; and an averment of the vendor's insolvency is not sufficient to excuse the failure to make such request.—*Carter v. Thompson*..... 375
15. *Conditional dismissal of cross bill.*—A decree of the chancellor, on final hearing, ordering a cross bill to be dismissed, unless the complainant therein made a specified amendment within a given time, operates as a dismissal of the cross bill, unless the prescribed terms are complied with; and a subsequent order of the register, dismissing the cross bill on account of the failure to comply with the prescribed conditions, if assignable as error on appeal from the final decree, is, at most, error without injury.—*S. C.*..... 375
16. *Note of evidence.*—Where the record does not contain any note of the evidence offered on the hearing, it is a grave question whether the appellate court can properly review the chancellor's decree on the pleadings and proof.—*S. C.*..... 375
17. *Variance.*—Under a bill for a specific performance or in the nature of a bill for a specific performance, a variance between the allegations and the proof, in the description of the land which is the subject of the suit, is fatal to any relief.—*S. C.*..... 375
18. *Same.*—Where lands are sold under a power of sale in a mortgage, and are conveyed by the purchaser, on the next day, to the mortgagee; and the mortgagor afterwards files bill to set aside the sales, on the ground that they are pretended and fraudulent, and are therefore void; if the proof does not sustain the allegation of fraud, he can not have relief on the ground that the mortgagee

CHANCERY—CONTINUED.

- himself, through the nominal purchaser as his agent, was the purchaser at his own sale.—*Robinson v. Cullom & Co.*..... 693
19. *Same.*—Where the bill alleged, that the complainant's husband, in taking a deed for certain lands purchased by him, "desired that the deed should convey the title to her in such manner that she and her husband could unite in re-conveying the same at any time, and make a perfect title to the purchaser;" and the deed, as executed, conveyed to the complainant a separate estate in the lands for life, with remainder to the children of her and her husband, and to the child which each of them had by a former marriage; while the proof showed, that his instructions to the draughtsman were, "that he wanted the land conveyed to his wife, and in such manner that the three sets of children should inherit it,"—there is a fatal variance between the allegations and the proof.—*Norris v. Smith.*..... 340
20. *Effect of answer as evidence.*—Where judgment creditors, who have exhausted their legal remedies, file a bill in equity to reach equitable assets of their debtor, the issue and return of executions on their judgments, as alleged, is a matter which is presumed to be within the debtor's knowledge; consequently, his failure to either admit or deny, in his answer, the allegations of the bill as to that matter, is an admission of their truth: and the issue and return of the executions, as alleged, being thus established as against him, his co-defendant, in whom is vested the legal title to the land sought to be condemned, and whose prior lien is allowed by the decree, can not insist on other proof of those facts.—*Clark v. Jones.* 349
21. *Pleadings as to lapse of time, or statute of limitations.*—The lapse of time, or the statute of limitations, is available as a defense in equity on demurrer; and if there are any special circumstances, which bring the case within any exception to the general rule, they must be averred in the bill, or by way of special replication to a plea.—*Rugland's Executors v. Morton.*..... 344

CHARGE OF COURT.

1. *Abstract charge.*—A charge asked, which, although it may assert a correct legal proposition, is abstract, is properly refused.—*Jemison & Sloan v. Dearing's Ex'rs.*..... 283
2. *Verbal and written charges.*—A charge to the jury, if asked verbally, should be refused, because the statute (Code, § 2355) requires that charges asked should be in writing: yet, when a charge, which asserts a correct legal proposition, is asked and refused, the appellate court will not presume that it was asked verbally, unless the record shows that it was refused on that ground.—*Myatts & Moore v. Bell.* 222
3. *Charge requiring explanation.*—An affirmative charge, which, though obscure, or tending to mislead the jury, asserts a correct legal proposition, is not a reversible error, since the appellant might have protected himself against it by asking an explanatory charge.—*Pulliam, Wills, Rankin & Co. v. Newberry.*..... 168
4. *Charge on effect of testimony.*—A recital in the bill of exceptions,

CHARGE OF COURT—CONTINUED.

- that, after the plaintiff's attorney had closed his argument, "the defendant's counsel was proceeding to argue the case, when he was interrupted by the court, and informed that he should charge the jury, if they believed the evidence, that the land was subject to levy and sale under the plaintiff's execution, and that the defendant, as sheriff, was liable in not making the levy; *and in fact did so*,"—affirmatively shows that the charge was given by the court *ex mero motu*, in violation of section 2274 of the Code. (A. J. WALKER, C. J., *dissenting*.)—*Baker v. Russell*..... 279
5. *General charge on evidence*.—A charge to the jury, instructing them that "if they believed the evidence, they must find for the defendant," is equivalent to a demurrer to evidence and joinder therein; and such charge should never be given where the jury could legally find a verdict against the party in whose favor it is given.—*Walker's Adm'r v. Walker's Adm'r*..... 353
6. *Same*.—Repeated decisions of this court have established the propositions, that a general charge on the effect of the evidence, in favor of either party, is equivalent to a demurrer to the evidence; and that such a charge should never be given, where there is any conflict in the evidence on a material point; nor where it is necessary to draw an inference of fact, which the jury only can draw from the evidence, and which does not arise as a legal presumption from the facts proved; nor where the evidence only tends to prove the facts on which such charge is based; and the court is now prohibited by statute, (Code, § 2274; Revised Code, § 2678,) from giving such a charge, *ex mero motu*, in any case.—*Morris v. Hall*..... 510
7. *Charge ignoring proof of venue*.—A charge to the jury in a criminal case, which authorizes them to find the defendant guilty without proof of the venue, is erroneous.—*Green v. The State*..... 419
8. *Charge ignoring intent*.—A charge which authorizes the jury, in a prosecution for perjury, to find the defendant guilty without proof that the false oath was taken willfully and corruptly, is erroneous. *S. C.*..... 419
9. *Charge invading province of jury*.—The question of agency *vel non* is a question of fact for the decision of the jury; consequently, a charge which assumes the fact of agency as proved, is an invasion of the province of the jury.—*Mobile & Ohio Railroad Company v. Hopkins*..... 486

CLERKS.

1. *Payment of judgment to clerk*.—The clerk of a court, in which a judgment has been rendered, has statutory authority to receive payment, (Code, § 651; Revised Code, § 771,) and to enter satisfaction thereof; but he can only receive money, such as the plaintiff is bound to accept, and has no authority to receive depreciated paper currency: consequently, the reception by such clerk, in October, 1864, of treasury-notes of the Confederate State and of the State of Alabama, was unauthorized, and did not discharge the judgment. (Overruling *Haynes v. Wheat & Fennell*, 9 Ala. 239.)—*Aicardi v. Robbins*..... 541

CODE OF ALABAMA.

1. § ⁷²¹651. Authority of clerk to receive payment of judgment.—
Aicardi v. Robbins..... 541
2. § 775. Presentation of claim against county.—*Baabour County v. Horn*..... 114
3. § 939. Exercise of banking privilege by foreign corporation.—
Morris v. Hall..... 510
4. § 1199. Exaction of illegal toll.—*Lewis v. The State*..... 414
5. § 1203. Public bridges; liability of county for damages.—*Barbour County v. Horn*..... 114
6. §§ 1354-72. Widow's right of dower, and proceedings for its assignment.—*Glenn v. Glenn*..... 571
7. § 1550. Fraudulent conveyances.—*Hall, Moses & Roberts v. Heydon*..... 242
Also, *Pulliam, Wills, Rankin & Co. v. Newberry's Adm'r*..... 168
8. § 1571. Contracts made on Sunday.—*Flanagan v. Meyer & Co*.... 132
9. §§ 1662-3, 1669. Renunciation or waiver of right to administration.—*Sowell v. Sowell's Adm'r*..... 359
10. § 1738. Exemption of homestead for family of insolvent decedent.—*Chisolm v. Chisolm's Executors*..... 327
11. §§ 1771, 1778. Partial distribution of decedent's estate.—*Harrison's Adm'r v. Meadors and Wife*..... 274
12. § 1825. Compensation of administrators.—*Wright's Adm'r v. Wilkerson*..... 267
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13. §§ 1867-8. Sale of decedent's lands for division.—*Satcher v. Satcher's Adm'r*..... 26
Also, *Hoard v. Hoard's Adm'r*..... 590
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14. § 1925. Revivor of action by or against administrator.—*Russell v. Erwin's Adm'r*..... 292
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Also, *Glenn v. Glenn*..... 571
16. § 2038. *Ex-parte* statement of accounts against guardian.—*Bogia v. Darden and Wife*..... 322
17. § 2129. Who is proper party plaintiff.—*Carter v. Owens*..... 217
18. § 2131. When wife may sue alone.—*Carter v. Owens*..... 217
19. § 2141. Action against county.—*Barbour County v. Horn*..... 114
20. § 2146. Abatement and revivor of action.—*Foster v. Chamberlain & Co*..... 158
21. § 2253. Demurrer.—*Harrison v. Nolin*..... 256
22. § 2274. Charge on effect of testimony.—*Baker v. Russell*..... 279
Also, *Morris v. Hall*..... 510
23. § 2278. Consideration of contract sued on.—*Cowan v. Cooper*.... 187
24. § 2355. Verbal and written charges to jury.—*Myatts & Moore v. Bell*..... 222
25. § 2408. Re-hearing after final judgment at law.—*Harrison v. Nolin*..... 256

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26. § 2462. Exemption of homestead from levy and sale under execution.— <i>Kaster v. McWilliams</i>	302
27. § 2523. Garnishment against trustees.— <i>Hall, Moses & Roberts v. Heydon</i>	242
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30. §§ 3018, 3022. Notice of appeal.— <i>Harris v. Harris</i>	364
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COMMON CARRIERS.

See BAILMENT.

COMMON LAW.

1. *Presumed existence of, in other States*.—In the absence of proof to the contrary, the common law will be presumed to exist in other States, unaffected by statutory provisions.—*Walker's Adm'r v. Walker's Adm'r*..... 353

COMPTROLLER.

1. *Authority and duty of, to draw warrants on treasurer*.—The comptroller of public accounts has no authority to draw a warrant on the treasurer, for the payment of any claim against the State, unless expressly authorized and required by law to do so.—*Chisholm v. McGehee*..... 192

CONFLICT OF LAWS.

See BONDS, 4.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW.

1. *Admiralty jurisdiction; State and Federal*.—A demand for supplies furnished, in the port of Mobile, to a steamboat which is regularly licensed under the laws of the United States, enrolled at the custom-house in Mobile, and plying between that city and Columbus, Mississippi, and which belongs to a resident citizen of Mississippi, is a maritime contract, and can only be enforced, by admiralty process against the boat, in the Federal courts.—*Steamboat Mist v. Martin, Cowen & Co.*..... 712

CONSTITUTIONAL LAW—CONTINUED.

2. *Same*.—Neither the constitutional grant to the United States of judicial power in "all cases of admiralty and maritime jurisdiction," (art. III, § 2,) nor any of the acts of congress which have been passed to carry that grant into effect, takes away from the several States the right to create or declare a statutory lien in favor of a shipper, for the loss of his goods, on a vessel navigating an interior river above tide-water, and to authorize the enforcement of that lien in a State court, by a proceeding in the nature of a libel in admiralty; the suit being brought in the State in which the contract of affreightment was made, and in which are situated both the place at which the goods were shipped, and the place at which they were to be delivered. (A. J. WALKER, C. J., *dissenting*.)—*Steamboat Bel-fast v. Boom & Co.*..... 50
3. *Amendatory laws; requisites of*.—The constitutional provision contained in the second section of the fourth article, declaring that "no law, nor any section of any law, shall be revised or amended by reference only to its title and number, but the law or section revised or amended shall itself be set forth at full length," not only prescribes a rule of legislative procedure, but renders null and void any law which does not conform to its requirements. (JUDGE, J., *dissenting*.)—*Tuskaloosa Bridge Co. v. Olmstead*..... 9
4. *Same; act of Feb. 3d, 1866, amending charter of Tuskaloosa Bridge Company*.—The act approved February 3d, 1866, entitled "An act to amend an act to incorporate a company to build a bridge across the Warrior river opposite the city of Tuskaloosa, approved January 2d, 1833," (Session Acts, 1865-6, p. 268,) in failing to set out at length the amended act, contravenes the provisions of the second section of the fourth article of the constitution, and is, consequently, null and void. (JUDGE, J., *dissenting*.)—*S. C.*..... 9
5. *Appointment and election of judges of inferior courts*.—The constitutional provision contained in the amendment adopted in 1850, which requires the general assembly to provide by law "for the election of judges of the courts of probate and other inferior courts, by the qualified electors of the counties, cities, or districts, for which such courts may be respectively established," (Code, p. 49,) does not prevent the general assembly from establishing a county court, with common-law jurisdiction, and making the probate judge of the county, *ex officio*, the judge of such court.—*Randolph v. Baldwin*..... 305
6. *Ordinance No. 26, adopted September 28, 1865, admitting parol evidence of consideration of Confederate contracts*.—The third section of the ordinance adopted by the State convention on the 28th September, 1865, (No. 26,) so far as it declares that, "in all suits upon contracts made between the 1st September, 1861, and the 1st May, 1865, parol evidence shall be admissible to prove what was the consideration thereof, and whether or not the parties thereto understood or agreed that the same should be discharged by a payment in Confederate currency or treasury-notes," simply changes a rule

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- of evidence, as the legislative power might lawfully do, and does not impair the obligation of contracts within the meaning of the constitutional prohibition. (BYRD, J., *dissenting.*)—*Scheible v. Bacho*..... 423
- Also, *Kirtland v. Molton* 548
- Tarleton v. Southern Bank of Alabama*..... 722
7. *Same*, as to measure of damages for breach of contract.—The residue of that section, (which is in these words: “and if so, or if it appears so from the contract, then to show what was the real or true value of the consideration of the said contract, and what amount the plaintiff is legally, justly, and equitably entitled to receive according to the contract, by the judgment of the court,”) so far as it would affect the measure of damages for the breach of an express contract, and make the value of the consideration an element in determining the damages for a breach, is violative of the obligation of such contract, and is, therefore, unconstitutional and void. (BYRD., J., *dissenting*, held the entire section of the ordinance nugatory and void, unless it was simply intended to authorize the reformation of contracts at law, without the necessity of resorting to a court of equity; and he doubted whether that was the intention of the framers of the ordinance.)—*Kirtland v. Molton*..... 548
8. *Same*.—To authorize the reduction of a debt under this section of said ordinance, it must not only be shown that the consideration was Confederate currency, but also that there was an agreement or understanding, express or implied, that the debt might be discharged in such currency.—*Scheible v. Bacho*..... 423
9. *Status of Confederate and State governments during late war*.—On principles of international law, the governments of the Confederate States and of the State of Alabama, during the late war in the United States, were governments *de facto*.—*S. C.*..... 423
10. *Validity of contract made within Confederate States during war*.—The validity of contracts made within the territorial jurisdiction of the Confederate States, during the late war with the United States, must be tested by the constitution and laws of the governments *de facto* which then existed in that jurisdiction, and not by the constitution and laws of the United States.—*S. C.*..... 423
11. *Same*.—Held, on the authority of *Scheible v. Bacho*, (*supra*,) that a promissory note, executed in Alabama, in December, 1864, and payable on its face in Confederate currency, is not illegal and void, and that an action may be maintained for a failure to pay such note at maturity.—*Kirtland v. Molton*..... 548
12. *Enforcement of executory contract, based on loan of Confederate States treasury-notes*.—An executory contract, based on a loan of Confederate States treasury-notes, being valid by the *lex loci contractus* at the time it was entered into, may now be enforced in the courts of this State, acting under the constitution and laws of the United States; although the issue of such notes by the Confederate States was in contravention of the policy and interests of the United States; and although the use of such notes, in private contracts between citizens, remotely contributed to the furtherance of the

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- original illegal purpose for which they were issued. (BYRD, J., *dissenting*, held—1st, that the ordinance of secession, adopted in Alabama on the 11th January, 1861, was a nullity; 2d, that the constitution of the United States was, in legal contemplation, in force throughout the whole country during the war; 3d, that the validity of all contracts, now sought to be enforced through legal tribunals, must be determined by reference to the laws and policy of the United States; 4th, that the issue of treasury-notes by the Confederate States, to circulate as money, was contrary to the laws and policy of the United States, and the circulation of such notes as money, or as the basis of contracts, was equally illegal, and contrary to public policy; and, 5th, that executed contracts, though based on such treasury-notes, should not now be disturbed by the courts.)—*Scheible v. Bacho*. 423
13. *Receipt of Confederate money by administrator or guardian, and investment in Confederate States bonds*.—The principles settled in the cases of *Dockery v. McDowell*, and *Watson v. Stone*, (40 Ala. 441, 476,) as to the receipt of Confederate money by administrators and guardians, and investments by them in Confederate States bonds, re-affirmed.—*Beasley and Wife v. Watson* 234
Also, *Glenn v. Glenn*. 571
 Harris v. Parker. 604
14. *Ratification of judgments by ordinance of State convention*.—The ratification of judgments rendered during the war, by the ordinance of the State convention adopted on the 28th of September, 1865, (Ordinance No. 26,) "relieves them from any objection which might be taken to them on the ground that, at the time of their rendition, the State was in a position of open hostility and war with the Federal government."—*Randolph v. Baldwin* 305
15. "*Stay law*" of 1861, prohibiting issue of executions on judgments.—The fifth section of the act approved December 10, 1861, (entitled "An act to regulate judicial proceedings," and commonly known as the "stay law,") which prohibited the issue of an execution on a judgment, without the written consent of the defendant, until the expiration of twelve months from the ratification of a treaty of peace between the United States and the Confederate States, was unconstitutional and void, whether tested by the constitution of the United States, or by that of the Confederate States.—*Hudspeth & Co. v. Davis*. 389
16. *Act of February 18, 1867, to prevent discontinuance of undecided appeals*.—The act approved February 18, 1867, entitled "An act to prevent undecided appeals to the supreme court from losing their force, by discontinuance or otherwise, unless the appellant move for a discontinuance after legal cause therefor has occurred," (Session Acts, 1866-67, p. 547,) so far as it operates on appeals which had been discontinued by operation of law at the time of its passage, is an attempt by the legislature to exercise judicial power, and is, therefore, unconstitutional and void.—*Carleton & Slade v. Goodwin's Executor*. 153
17. *Manufacture of arms by or for State*.—There is no constitutional

CONSTITUTIONAL LAW—CONTINUED.

- provision, State or Federal, which prohibits the manufacture of arms by a State, or the making of a contract with other persons for their manufacture.—*Patton v. Gilmer*..... 176
18. *Validity of contract between State and Alabama Arms Manufacturing Company*.—Neither the contract between the State of Alabama and the *Alabama Arms Manufacturing Company*, nor the act of the legislature under which the contract was made, (Session Acts, 1861, p. 75,) shows on its face that the arms were to be manufactured during the late war, or that the contract was otherwise illegal and void; consequently, the court can not, on demurrer to a complaint for a breach of the contract, declare the contract void.—*S. C.*..... 177
19. *State taxation of imports*.—A person who purchases goods from an importer, after they have been brought within the boundaries and jurisdiction of the United States, but before they have been delivered at the port of entry, and before duties have been paid on them, and who then transports them, at his own expense, to the port to which they were consigned, is not an importer, and is not entitled to be subrogated to the rights and immunities of his vendor; but the goods, or the proceeds of their sale, are subject in his hands to taxation by State authority, although he retains and sells them in the unbroken packages in which they were imported.—*Mayor and Aldermen of Mobile v. Waring*..... 139
20. *Same*.—*Held*, on the authority of *Hinson v. Lott*, (40 Ala. 123,) that the provision contained in the tenth section of the first article of the constitution of the United States, which prohibits the States to “lay any imposts or duties on imports,” does not take away from the State the right to tax, or to delegate to a municipal corporation the power to tax, the sales of articles which have been brought here from other States of the Union, although they are sold by the importer in the form, bulk, and packages in which they are so imported.—*Woodruff & Parker v. Parham*..... 334
21. *State taxation of steamboats and vessels*.—The provision of the Federal constitution, (art. I, § 10,) which prohibits a State to “lay any duty on tonnage,” applies to and includes vessels which are licensed in the coasting trade, and which are exclusively engaged in the tonnage and lighterage business in the bay and harbor of Mobile, carrying passengers and freight between the city and vessels at anchorage in the bay; and as to such vessels, the tax imposed by the twelfth paragraph of the second section of the revenue law approved February 22, 1866, (Session Acts, 1865-6, p. 7,) “on all steamboats, vessels, and other water-craft plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage thereof,” is unconstitutional and void.—*Lott v. Morgan*..... 246

CONTRACTS.

1. *Contracts made on Sunday*.—There is a material difference between the provisions of the Code, (§§ 1571, 3302-03,) and the provisions of the act of 1803, (Clay's Digest, 592, § 1,) in relation to violations of the sabbath by contracts or worldly business: the act of 1803

CONTRACTS—CONTINUED.

- prohibited all worldly business on that day, while the inhibition of the Code is restricted to certain specified acts, and, being penal in its character, must receive a strict construction.—*Flanagan v. Meyer & Co.*..... 132
2. *Same.*—The writing and signing of a note on Sunday is not a contract, unless it is also delivered on that day; nor does the statute (Code, § 1571) prohibit the writing and signing of a note on that day, and delegating to another, either expressly or by implication, authority to deliver it to the payee on another day.—*S. C.*..... 132
3. *Same.*—In an action on a promissory note, signed by two sureties and their principal, as joint makers; the only evidence in the case showing, that the note was written on Sunday morning, at the house of one of the sureties, and was then and there signed by said surety and the principal, (the other surety and the payee not being present,) and that the principal then took it and rode away; the court may properly refuse to instruct the jury, at the instance of said surety, "that if she was only surety on the note, and if all she did in relation to the execution of it was done on Sunday, they can not find against her;" and may also refuse to instruct them, at the instance of the principal, "that if he signed the note on Sunday, and there was no proof as to when it was delivered, they could not find against him."—*S. C.*..... 132
4. *Validity of contract between State and Alabama Arms Manufacturing Company.*—Neither the contract between the State of Alabama and the *Alabama Arms Manufacturing Company*, nor the act of the legislature under which that contract was made, (Session Acts, 1861, p. 75,) shows on its face that the arms were to be manufactured during the late war, or that the contract was otherwise illegal and void; consequently, the court can not, on demurrer to a complaint for a breach of the contract, declare the contract void.—*Patton v. Gilmer.*..... 176
5. *Validity of contract made within Confederate States during war.*—The validity of contracts made within the territorial jurisdiction of the Confederate States, during the late war with the United States, must be tested by the constitution and laws of the governments *de facto* which then existed in that jurisdiction, and not by the constitution and laws of the United States.—*Scheible v. Bacho.*..... 423
6. *Same.*—Held, on the authority of *Scheible v. Bacho*, (*supra*,) that a promissory note, executed in Alabama, in December, 1864, and payable on its face in Confederate currency, is not illegal and void, and that an action may be maintained for a failure to pay such note at maturity.—*Kirtland v. Molton.*..... 548
7. *Enforcement of executory contract, based on loan of Confederate States treasury-notes.*—An executory contract, based on a loan of Confederate States treasury-notes, being valid by the *lex loci contractus* at the time it was entered into, may now be enforced in the courts of this State, acting under the constitution and laws of the United States; although the issue of such notes by the Confederate States was in contravention of the policy and interests of the United States; and although the use of such notes, in private

CONTRACTS—CONTINUED.

- contracts between citizens, remotely contributed to the furtherance of the original illegal purpose for which they were issued. (BYRD, J., *dissenting*, held—1st, that the ordinance of secession, adopted in Alabama on the 11th January, 1861, was a nullity; 2d, that the constitution of the United States was, in legal contemplation, in force throughout the whole country during the war; 3d, that the validity of all contracts, now sought to be enforced through legal tribunals, must be determined by reference to the laws and policy of the United States; 4th, that the issue of treasury-notes by the Confederate States, to circulate as money, was contrary to the laws and policy of the United States, and the circulation of such notes as money, or as the basis of contracts, was equally illegal, and contrary to public policy; and, 5th, that executed contracts, though based on such treasury-notes, should not now be disturbed by the courts.)—*Scheible n. Bacho*..... 423
8. *Purchase of cotton by foreign bank, during late war, with Confederate States treasury-notes; validity of contract*.—The purchase of cotton by a foreign banking corporation, in this State, is not an exercise of "the privilege of banking," with the meaning of section 939 of the Code, (Revised Code, § 1176,) which requires such corporations to exercise that privilege "by the exclusive use of gold and silver coin and bank-bills issued by authority of this State;" consequently, the contract for such purchase is not void under the provisions of that statute, because the price was agreed to be paid, and was paid, in treasury-notes of the Confederate States; but such contract is void under the laws of the United States, and the proclamations of the president issued in conformity thereto, (12 U. S. Statutes at large, 257, 1264, 1267,) when shown to have been made in Alabama, in December, 1862, after the capture of New Orleans by the Federal forces, by a banking corporation which was chartered under the laws of Louisiana, and which was located in New Orleans.—*Morris v. Hall*..... 510
9. *Extra-territorial contract by corporation*.—*Semble*, that a corporation can not do any act, nor make any contract, outside of the limits of the State by which it is created, unless the power to do so is expressly conferred by its charter.—*S. C.*..... 510
10. *Delivery of possession under invalid contract; estoppel en pais*. If the vendor of a chattel receives payment of the purchase-money, and delivers possession of the property to the purchaser, he can not be heard, in a court of law, to assert the invalidity of the contract as a ground of recovery, whether such invalidity arises from the illegality of the consideration, or from the legal incapacity of the purchaser to make the contract.—*S. C.*..... 510
11. *Excuse for non-performance*.—The condition of a replevin bond, executed in 1859, for the forthcoming of slaves taken under attachment, having become, by the abolition of slavery before forfeiture, both illegal and impossible of performance, the surety is discharged from all liability.—*Glover v. Taylor & Co.*..... 124
12. *Mistake*.—In an action on a written contract, an alleged mistake

CONTRACTS.—CONTINUED.

is not available as a defense ; the mistake must be first corrected, by an appropriate proceeding, in equity.—*Steamboat Belfast v. Boon & Co.*..... 51

See, also, BAILMENT,
BONDS.

CORPORATION.

1. *Liability of municipal corporation to garnishment.*—Under the provisions of the act approved February 22, 1866, (Revised Code, § 2895,) process of garnishment lies against a municipal corporation, to subject the wages or salary of a policeman to the satisfaction of a judgment obtained against him.—*City Council of Montgomery v. Van Dorn*..... 505
2. *Answer of such corporation.*—Under the provisions of this statute, the answer of the corporation is not required to be under its corporate seal, but may be made by the treasurer, upon whom the garnishment is served.—*S. C.*..... 505
3. *Extra-territorial contract of corporation.*—*Semble*, that a corporation can not do any act, nor make any contract, outside of the limits of the State by which it is created, unless the power to do so is expressly conferred by its charter.—*Morris v. Hall*..... 510

COUNTY.

See ACTION, 1, 2.

CRIMINAL LAW.

1. *Buying or receiving stolen property ; constituents of offense.*—The offense of buying or receiving stolen property, knowing it to have been stolen, (Code, § 3178, 3182 ; Revised Code, § 3710.) may be consummated through the instrumentality of others, without seeing the property.—*Huggins v. The State*..... 393
2. *Same ; sufficiency of indictment in averring guilty knowledge.*—An averment that the defendants “ feloniously bought or received two horses, of the value of one hundred dollars each, the personal property of S. W., which said horses had before then been feloniously taken and carried away, and they (the said defendants) well knowing that the said horses had been feloniously taken and carried away,”—shows with sufficient certainty that the defendants had knowledge of the larceny at the time they bought or received the horses.—*S. C.*..... 393
3. *Same ; variance ; charge tending to mislead jury.*—Under an indictment for buying or receiving stolen property, (Code, § 3178, 3182 ; Revised Code, § 3710,) a conviction cannot be had on proof of concealing, or aiding in the concealment of the property ; yet the court may properly refuse to instruct the jury, at the instance of the defendant, “ that, although he may have concealed, or aided in the concealment of the property, knowing it to have been stolen, they cannot find him guilty as charged in the indictment,” since such charge does not negative the buying or receiving.—*S. C.*..... 393

CRIMINAL LAW—CONTINUED.

4. *Defendant's declarations connected with prosecution, tending to show implied admission of guilt.*—Any conduct on the part of the defendant, in reference to the prosecution pending against him, which tends to authorize the implication of an admission of guilt by him, is competent evidence against him ; as where one of his bail suggested to him that he might risk a liability on his bond for six months longer, and possibly compromise it if necessary, and he replied, "Do as you see fit."—*S. C.*..... 393
5. *Voluntary escape; sufficiency of indictment for.*—An indictment for a voluntary escape, (Penal Code, § 28 ; Revised Code, § 3569,) which conforms substantially to the form prescribed by the statute, (No. 46,) is sufficiently definite and certain to authorize a conviction for a voluntary escape, whether the defendant be an officer or not.—*Kavanaugh v. The State*,..... 399
6. *Same; conviction of less offense than charged.*—Under an indictment against an officer, for a voluntary escape, a conviction may be had for a negligent escape, (Penal Code, § 647 ; Revised Code, § 4199,) because the greater offense includes the less ; but, whether a conviction can be had on proof of a voluntary escape, under an indictment which charges a negligent escape, as was held in *Nall v. The State*, (34 Ala. Rep. 262,) *quære?*—*S. C.*..... 399
7. *Same; same.*—Although a special deputy, "employed in a particular case" by a sheriff, is not an officer within the meaning of the constitution, or of section 29 of the Penal Code, (Revised Code, § 3570,) which relates to negligent escapes by officers ; yet, at common law, if he had the legal custody of a person who was charged with an indictable offense, and negligently suffered such person to escape, he might be indicted and convicted for a negligent escape ; and under the provisions of the Penal Code, (§ § 28-9, 210, 570 ; Revised Code, § § 3569-70, 3757, 4120,) if the indictment charges that he had the legal custody of a person charged with an indictable offense, and voluntarily suffered such person to escape, he may be convicted of a negligent escape, and fined any sum not exceeding five hundred dollars, as prescribed by section 207 of the Penal Code.—*S. C.*..... 399
8. *Larceny; assessing value of stolen property.*—Under an indictment for the larceny of a horse, (Code, § § 3180, 3175,) it is not error to refuse to instruct the jury, at the instance of the defendant, "that they must assess the value of the property according to its value in gold."—*Yarborough v. The State*..... 405
9. *Proof of criminal acts not charged, as relevant to question of identity, intent, or guilty knowledge.*—Where the question of identity or intent is involved, or where it is necessary to show a guilty knowledge on the part of the prisoner, evidence may be received of other criminal acts than those charged in the indictment.—*S. C.*..... 405
10. *Competency of convicted felon, who has been pardoned, as witness.*—A pardon restores the competency of a felon, who has been rendered incompetent as a witness by a conviction of an infamous crime, although it is not affirmatively shown "that the warrant of pardon restored him to the rights of citizenship."—*S. C.*..... 405

CRIMINAL LAW—CONTINUED.

11. *Larceny; what constitutes asportavit.*—Where the only witness for the prosecution, under an indictment for the larceny of a hog, testified, "that he heard a gun fire in the woods, and, immediately afterwards, heard a hog squeal; that he saw the defendant, soon afterwards, chasing the hog, and pursued him; that the defendant chased the hog about one hundred yards, and was in the act of striking it with his gun, when witness came up with him, and asked him what he was doing; and that he replied, he had shot at a squirrel, and hit the hog, and he wanted to see where the hog was shot,"—*held*, that this did not show a sufficient caption or *asportavit* to consummate the offence of larceny.—*Wolf v. The State*. 412
12. *Same; ownership of stolen property; variance.*—When the ownership of the stolen property is laid in three persons as executors, a conviction can not be had on proof that the ownership was in two of them only.—*Parmer v. The State*. 416
13. *Conviction of attempt to commit misdemeanor charged.*—Under an indictment for a misdemeanor, a conviction may be had of an attempt to commit the offense charged, if the proof fails to show that the offense was consummated.—*Wolf v. The State*. 412
14. *Severance of trial discretionary.*—The allowance of a severance, in a criminal case, is a matter of discretion with the primary court, (Penal Code, § 638; Revised Code, § 4190,) and its refusal is not error.—*Parmer v. The State*. 416
15. *Organization of grand jury shown by record.*—In a criminal case, the record must affirmatively show the organization of the grand jury; and an endorsement on an indictment, which purports to be signed by the foreman of the grand jury, is not sufficient proof of that fact.—*S. C.* 416
16. *Illegal toll; sufficiency of indictment against keeper of public bridge.*—In an indictment against the keeper of a public bridge, for exacting illegal toll, (Code, § 1199,) there must be an averment that the bridge was licensed by the commissioners' court of the county, and the prescribed rates of toll must be specified; an averment that the bridge "was chartered by the commissioners' court" of the county, and that the defendant, "being employed as the keeper of said bridge, did demand and collect from B. F. P. larger toll than is authorized by said charter," is not sufficient.—*Lewis v. The State*. 414
17. *Charge ignoring proof of venue.*—A charge to the jury in a criminal case, which authorizes them to find the defendant guilty without proof of the venue, is erroneous.—*Green v. The State*. 419
18. *Charge ignoring intent.*—A charge which authorizes the jury, in a prosecution for perjury, to find the defendant guilty without proof that the false oath was taken willfully and corruptly, is erroneous.
S. C. 419
19. *Proof of venue.*—The appellate court will not pass on the sufficiency of the proof of venue in a criminal case, where no question was raised in the court below in reference to it.—*Huggins v. The State*. 393

CRIMINAL LAW—CONTINUED.

20. *Criminal jurisdiction of justice of the peace.*—Under section 384 of the Penal Code, (Revised Code, § 3932,) a justice of the peace has jurisdiction of larceny, concurrently with the circuit court, where the value of the stolen property is less than ten dollars; and this jurisdiction is not taken away, or affected, by the acts approved respectively on the 7th December, 1866, and the 31st January, 1867, (Session Acts, 1866–7, pp. 115, 306,) which repealed the two acts approved on the 20th January, 1866, (Session Acts, 1865–6, pp. 118, 119,) conferring jurisdiction in criminal cases on justices of the peace, and regulating proceedings before them.—*Ex parte Hixon*..... 410

DAMAGES.

1. *Measure of, for breach of contract.*—In an action by the buyer, against the seller, to recover damages for the breach of a special contract to deliver cotton at a specified time and place, the measure of damages is the value of the cotton at the time of the breach; and the fact that the price has been paid in advance, does not affect the principle.—*Rose's Executors v. Bozeman*..... 678
2. *Same.*—In an action on several promissory notes, payable on their face in Confederate currency, in February, April, and June, 1865, the measure of damages is the value of the specified currency at the maturity of the notes respectively.—*Kirtland v. Molton*..... 548
3. *Same, as affected by ordinance of September 28, 1865.*—The third section of the ordinance adopted on the 28th September, 1865, (No. 26,) which provides that, in suits upon contracts made between the 1st September, 1861, and the 1st May, 1865, “parol evidence shall be admissible to prove what was the consideration thereof, and whether or not the parties thereto understood or agreed that the same should be discharged by a payment in Confederate currency or treasury-notes; and if so, or if it appears so from the contract, then to show what was the real or true value of the consideration of the said contract, and what amount the plaintiff is legally, justly, and equitably entitled to receive according to the contract, by the judgment of the court,” so far as it would affect the measure of damages for the breach of an express contract, and make the value of the consideration an element in determining the damages for a breach, is violative of the obligation of such contract, and is, therefore, unconstitutional and void.—*S. C.*..... 548
4. *Relevancy of evidence on question of damages.*—The fact that the plaintiff in detinue, having obtained the possession of the property in controversy by executing the statutory bond, (Code, § 2192,) afterwards sold the property under the mortgage which was the foundation of his title, and that the defendant became the purchaser at the sale, and received the property under his purchase, is not competent evidence for the plaintiff, under the plea of the general issue, for the purpose of mitigating the defendant's damages.—*Foster v. Chamberlain & Co.*..... 158

DEPOSITION.

1. *Notice of filing interrogatories.*—On motion to suppress the deposition of a witness before the commencement of the trial, on account of the failure to give notice of the filing of the interrogatories, the sheriff may amend his return, so as to show that notice was in fact given; and the return being thus amended, the motion to suppress may be overruled, although the return does not show when the notice was given, nor that it was given ten days before the deposition was taken.—*Stuckey v. Bellah*..... 701

DETINUE.

1. *When action lies.*—The plaintiff can not recover in detinue, when the general issue is pleaded, without proving that the defendant had possession of the property at the commencement of the suit, or showing facts which bring the case within the exceptions to the general rule as to possession; and in the absence of such proof by the plaintiff, it is error to instruct the jury that, “under the pleadings in the case, a possession by the defendant would be implied.” *Poster v. Chamberlain & Co*..... 158
2. *Proof of outstanding title by defendant.*—Where the plaintiff in detinue, never having had actual possession, is driven to proof of his title to sustain the action, the defendant may defeat a recovery by proof of a superior outstanding title in a third person, without connecting himself with it.—*S. C.*..... 158
3. *Relevancy of evidence on question of damages.*—The fact that the plaintiff in detinue, having obtained the possession of the property in controversy by executing the statutory bond, (Code, § 2192,) afterwards sold the property under the mortgage which was the foundation of his title, and that the defendant became the purchaser at the sale, and received the property under his purchase, is not competent evidence for the plaintiff, under the plea of the general issue, for the purpose of mitigating the defendant’s damages.—*S. C.*..... 158
4. *Forthcoming bonds in detinue cases, and under 3d section of “stay law” of February 8, 1861.*—Where the complaint in an action of detinue, instituted in April, 1861, is in the form prescribed by the Code, (p. 552,) “for the recovery of chattels in specie;” while the forthcoming bond taken from the defendant, instead of being conditioned as required by section 2192 of the Code, is drawn in pursuance of the provisions of the third section of the act approved February 8, 1861, commonly called the “stay law,” (Session Acts, 1861, p. 4,) there is no statute which gives to the bond, when returned forfeited, the force and effect of a judgment, or authorizes the issue of an execution on it.—*Rose v. Pearson*..... 253
5. *Form of judgment.*—In detinue for slaves, (or in the analogous action prescribed by the Code, p. 552, “for the recovery of chattels in specie,”) the action having been commenced before the abolition of slavery, a judgment, on verdict, may be rendered for the plaintiff, for the slaves or their alternate value, notwithstanding the abolition of slavery before the trial. (BYRD, J., not concurring.) *Rose v. Pearson*..... 687

DETINUE—CONTINUED.

6. *Same*.—In an action for the recovery of slaves, brought by a mortgagee, judgment on verdict having been rendered for the plaintiff, since the abolition of slavery, for the slaves or their alternate value; an entry in the judgment, made at the instance of the plaintiff, to the effect that "this judgment is to be discharged on the payment of" the balance due on the mortgage debt, as ascertained by the verdict of the jury, is, at most, error without injury.—*S. C.*..... 687
7. *Form of verdict; assessing separate value of property*.—In such action, the failure of the jury to assess the value of each of the slaves separately, if erroneous, is not an error of which the defendant can complain; since the abolition of slavery, of which the court will take judicial notice, has rendered it impossible for the defendant to make a voluntary delivery of the slaves, and impossible for the plaintiff to compel their delivery by any legal process.—*S. C.*..... 687

DISCONTINUANCE.

1. *Of action at law*.—In an action against several defendants, if the judgment is erroneously entered up against one of them only, this is not a dismissal or discontinuance of the action as to the others, but is a mere clerical misprision, which will be considered on error as amended.—*Russell v. Erwin's Adm'r.*..... 292
2. *Of appeal, by failure to file transcript*.—By the settled practice of this court, an appeal or writ of error is discontinued, and becomes *functus officio*, unless the transcript is filed at the return term, or unless the cause is placed on the docket by an appropriate order; and this by operation of law, without any action on the part of the court, or any motion on the part of the appellee.—*Carleton & Slade v. Goodwin's Executor.*..... 153
3. *Constitutionality of act of February 18, 1867, to prevent discontinuance of undecided appeals*.—The act approved February 18, 1867, entitled "An act to prevent undecided appeals to the supreme court from losing their force, by discontinuance or otherwise, unless the appellant move for a discontinuance after legal cause therefor has occurred," (Session Acts, 1866-67, p. 547,) so far as it operates on appeals which had been discontinued by operation of law at the time of its passage, is an attempt by the legislature to exercise judicial power, and is, therefore, unconstitutional and void.—*S. C.*... 153

DOWER.

1. *Right to dower, of widow having separate estate; valuation of separate estate*.—In computing the value of a widow's statutory separate estate, on her application for dower in the lands of her deceased husband, (Code, § 1991; Revised Code, § 2380,) the value of her property at the time of the allotment of dower, and not at the death of her husband, must be taken; and consequently, where her separate estate consisted principally of slaves, which were emancipated, after the death of her husband, by the abolition of slavery in Alabama, their value is not to be estimated. (WALKER, C. J., *dissenting*.)—*Steadman v. Steadman.*..... 473

DOWER—CONTINUED.

2. *Dower and quarantine of widow having separate estate.*—The provisions of the Code in reference to the right of dower and proceedings for its assignment, from section 1354 to section 1372, both inclusive, apply only to cases in which the wife has no statutory separate estate; and sections 1991 and 1992, which take away or limit the right of dower of a widow who has a separate estate, apply only to statutory separate estates. (WALKER, C. J., *dissenting.*)—*Glenn v. Glenn*. 571
3. *Same.*—A widow who has a statutory separate estate, no matter what its value may be, can not claim, as matter of right, an allotment of dower in any part of her husband's lands; nor has she any right to retain the possession of the dwelling-house, &c., which is but a statutory substitute for quarantine at common law. (WALKER, C. J., *dissenting.*)—*S. C.*..... 571

EJECTMENT.

See REAL ACTION.

ERROR AND APPEAL.

I WHEN APPEAL LIES.

1. *From void decree.*—An appeal does not lie from a decree of the probate court, which purports to have been rendered on final settlement of the accounts and vouchers of a deceased administrator, and which shows on its face that the court had no jurisdiction to render it; and an appeal from such a decree will be dismissed by the court, *ex mero motu*. (A. J. WALKER, C. J., *dissenting.*)—*Hays v. Cockrell*. 75
2. *From order granting or refusing re-hearing.*—The action of the primary courts in granting or refusing a new trial under the ordinance of the State convention adopted on the 28th September, 1865, (No. 26,) unlike their action on a petition for re-hearing under the Code, (§§ 2407-17,) will not support an appeal.—*Ketchum and Wife v. Dennis and Wife*. 183
3. *From decree of partial distribution.*—Under the provisions of the act approved December 12, 1857, (Session Acts, 1857-8, p. 244,) an appeal lies from a decree or order for the partial distribution of a decedent's estate, in favor of the personal representative, as well as in favor of the distributee.—*Harrison's Adm'r v. Meadors and Wife*. 274

II PRACTICE.

4. *Parties to appeal.*—The purchaser of lands, sold under an order of the probate court, for the purpose of making an equitable division among the heirs, is not a necessary party to an appeal sued out by the heirs, to reverse the order of sale and the subsequent order confirming the sale.—*Hoard v. Hoard's Adm'r*. 590
5. *Receiving satisfaction of order or decree appealed from.*—An appeal from an order of the probate court for the sale of a decedent's lands for division, and from a subsequent order confirming the sale, will

ERROR AND APPEAL—CONTINUED.

- not be dismissed, at the instance of the administrator, because the infant heirs, who are the appellants, have received the proceeds of sale on final distribution of the decedent's estate, and have not offered to make restitution ; it being shown that the money was voluntarily paid by the purchaser, and received by the administrator, more than twelve months before it became due by the terms of sale, and that the payment was thus made, in 1863, in Confederate States treasury-notes.—*S. C.*..... 590
6. *Affirmance on certificate.*—Under the Code, (§ 3031,) unlike the practice under the former statute, (Clay's Digest, 308, § 13,) an affirmance of a judgment on certificate, on account of the failure to file the transcript at the return term of the appeal or writ of error, can only be had at the return term.—*Carleton & Slade v. Goodwin's Executor*..... 153
7. *Discontinuance, by failure to file transcript.*—By the settled practice of this court, an appeal or writ of error is discontinued, and becomes *functus officio*, unless the transcript is filed at the return term, or unless the cause is placed on the docket by an appropriate order ; and this by operation of law, without any action on the part of the court, or any motion on the part of the appellee.—*S. C.* 153
8. *Same.*—The act approved February 18, 1867, entitled "An act to prevent undecided appeals to the supreme court from losing their force, by discontinuance or otherwise, unless the *appellant* move for a discontinuance after legal cause therefor has occurred," (Session Acts, 1866-67, p. 547,) so far as it operates on appeals which had been discontinued by operation of law at the time of its passage, is an attempt by the legislature to exercise judicial power, and is, therefore, unconstitutional and void.—*S. C.*..... 153
9. *Citation ; form, service, and return of.*—A citation on appeal (Code, § 3018) may be in the form of a notice, addressed to the appellee, and must be executed by the sheriff, and returned by him to the officer by whom it was issued ; and the original citation, with the return of service endorsed thereon, may be forwarded to the appellate court, with the transcript, though the better practice is to copy it into the transcript, (Code, § 3022,) as a part of the "proceedings in the cause."—*Harris' Heirs v. Harris' Adm'r*,..... 364
10. *Certificate to transcript ; by whom given.*—When the final certificate, appended to a transcript, purports to be signed by the probate judge of the county, the transcript will not be struck from the files on motion, on the ground that the officer giving it is not in fact the probate judge ; the right to an office cannot be determined on such a motion.—*S. C.*..... 364
11. *Certificate of appeal ; certiorari.*—When the clerk does not certify the time when the appeal was taken, nor even the fact that any appeal at all was taken, (Code, §§ 3016, 3022,) the appeal will be dismissed on motion ; but, if the transcript shows that a sufficient certificate might have been made, and the cause is submitted on the merits when regularly reached on the docket, and the submission is afterwards set aside, at the instance of the appellee, in the absence of the appellant's counsel, the court will continue the motion to

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- dismiss, and award a *certiorari*, *ex mero motu*, to perfect the certificate.—*Ala. & Miss. Rivers Railroad Co. v. Hungerford*..... 388
12. *Assignment of error by party not appealing*.—On appeal from a judgment of the circuit court, instructing the sheriff how to apply certain moneys in his hands on sundry executions, an assignment of error by one of the plaintiffs in execution, who took no appeal, though he reserved a bill of exceptions, will be treated as a nullity by the court, when it is not made with the consent of all the parties in adverse interest, and there is no joinder in error by them as to such assignment.—*Kirksey v. Hardaway*..... 330
13. *Waiver of objections to appeal, &c., by joinder in error*.—Where an appeal from a decree in chancery is sued out in the name of one of the defendants only, and errors are assigned in the names of all the defendants, a joinder in error is a waiver of all objections that might be raised, either to the appeal, or to the assignments of error.—*Carter v. Thompson*..... 375
14. *Same*.—A motion to dismiss an appeal, on account of the failure of the clerk to certify that an appeal was taken, or that any security for the costs was given, comes too late after a joinder in error.—*Myers v. Segars*..... 383
15. *What is revisable*.—The appellate court cannot revise the decision of the probate court on the facts of the case, unless the record sets out all the evidence that was before the probate court.—*S. C.*..... 383
16. *Same*.—When the record does not set out the evidence, on which the court below granted a re-hearing after final judgment, (Code, § 2408,) the appellate court can not revise its action.—*Harrison v. Nolin*..... 256
17. *Error without injury, in admission of illegal evidence*.—Where the bill of exceptions purports to set out all the evidence, and shows that the plaintiff was not entitled to recover, the admission of illegal evidence, against his objection, is, at most, error without injury.—*Hawkins' Adm'r v. Dumas*..... 391
18. *Same*.—On the trial of an issue before the probate court, without the intervention of a jury, the admission of illegal evidence is, at most, error without injury, since the appellate court, in passing on the merits of the case, will consider only the legal evidence.—*Kirksey v. Kirksey*..... 626
19. *Same*.—The admission of redundant evidence, against the objection of a party, is, at most, error without injury.—*Jemison & Sloan v. Dearing's Executors*..... 283
20. *Same*.—The admission of evidence which is, *prima facie*, incompetent, is, at most, error without injury, when the record shows that the necessary preliminary proof was afterwards introduced.—*Montgomery & West Point Railroad Co. v. Edmonds*..... 667
21. *Presumption in favor of ruling of primary court*.—In a case before the probate court, where the correctness of the ruling of the primary court depends on the proof, and the record does not purport to set out all the evidence on which the probate judge acted, the appellate court will presume that his decision was justified by the evidence.—*Wills & Hobbs v. Rand's Adm'rs*..... 199

ERROR AND APPEAL—CONTINUED.

22. *Same*.—On an application by the sheriff, for instructions as to the appropriation of money under sundry executions in his hands, the appellate court can not revise the ruling and decision of the primary court, unless all the evidence is set out in the record.—*May v. Lewis*. 315
23. *Same*.—When it is necessary that a decree of the probate court, to be affirmed on error, should have been rendered at a regular term of the court, and the record does not affirmatively show that it was rendered at a special term, the appellate court will presume that the regular term was continued, from day to day, until the day on which the decree was rendered.—*Harrison's Adm'r v. Meudors and Wife*. 274
24. *Same*.—When a cause is submitted to the decision of the court on an agreed statement of facts, the court is not authorized to presume the existence of any other facts than those agreed on; nor will the appellate court indulge such presumption, even for the purpose of sustaining the judgment.—*Kirksey v. Hardaway*. 338
25. *Review of decision of probate court on contested question of fact*.—In reviewing the decision of the probate court on a controverted question of fact, which was tried before the court without the intervention of a jury, the appellate court will not reverse the judgment, except in cases where, upon established legal principles, the verdict of a jury would be set aside by the court.—*Kirksey v. Kirksey*. 626

ESTATES OF DECEDENTS.

1. *Sale of lands for division; nature of proceeding, and jurisdiction of court*.—Repeated decisions of this court have settled the doctrine, that a proceeding before the probate court for the sale of a decedent's real estate, for equitable division among the heirs, is *in rem*; that the jurisdiction of the court attaches on the filing of a petition, stating therein a statutory ground for the order of sale; and that where the jurisdiction of the court has attached on the filing of such a petition, mere errors and irregularities in the proceedings do not render void the order of sale.—*Satcher v. Satcher's Adm'r*. 26
2. *Same; sufficiency of petition*.—An averment in the petition, that the lands can not be "fairly, beneficially, and equitably divided," without a sale, is a substantial compliance with the statutory requisition that they "can not be equitably divided," (Code, § 1867,) and is sufficient to sustain the jurisdiction of the court on a motion to set aside the sale.—*S. C.* 26
3. *Same, as affected by act of February 7, 1854, "to regulate the sale of real and personal property by executors and administrators"*.—The principles above stated are not in any manner changed or affected by the provisions of the act approved February 7, 1854, (Session Acts, 1853-4, p. 55,) entitled "An act to regulate the sale of real and personal property by executors and administrators." The word *act*, as used in the fifth section of that statute, means the fifth section only, and not the whole act. (BYRD, J., *dissenting*.)—*S. C.* 26
4. *Same; sufficiency of petition in describing heirs*.—If the petition does not state the ages and christian names of the heirs, although it

ESTATES OF DECEDENTS—CONTINUED.

- shows that they are infants, and states the name of their guardian, it is fatally defective. (Code, § 1868.) and will not support an order of sale; and if these omissions or defects in the petition can be cured, in any case, by the recitals contained in the order of sale, they are not cured by a recital, as in this case, that the names of the infants were *Angeline* and *Mary*, while the depositions on file simply describe them as *Angie* and *Mollie*.—*Hoard v. Hoard's Adm'r* 590
5. *Same; same*.—A petition for the sale of a decedent's real estate, for the purpose of making an equitable division among his heirs-at-law, (Code, § 1864,) which states the names of all the heirs, describing four of them as minors, and two of them as married women, but not averring whether the latter and their husbands are of full age or not, is fatally defective on error. (WALKER, C. J., expressing no opinion.)—*Page and Wife v. Matheis' Adm'r* 719
6. *Same; notice to heirs*.—If any of the heirs, in such proceeding, are married women, the statute imperatively requires that the citation must be served on their husbands, (Code, § 1870,) as well as on them.—*S. C.* 719
7. *Same; place of sale*.—Under the provisions of the Code, (§§ 1872, and 1764.) and of the act approved November 19, 1853, amendatory of section 1764, (Session Acts, 1853-54, p. 252,) an order for the sale of a decedent's real estate, for division among the parties interested, must specify the place of sale; otherwise, no legal sale can be made under it.—*Brown v. Brown's Adm'r* 215
8. *Sale of decedent's stock of goods*.—To authorize the sale of a decedent's stock of goods under the provisions of the act of February 5, 1858, (Revised Code, § 2074,) it must be affirmatively shown that he "was engaged in mercantile business in this State;" and where neither the petition nor the recitals of the court show this fact, the order of sale is void, and the administrator is chargeable as for a conversion of the goods.—*Harris v. Parker* 604
9. *Sale of perishable property; sufficiency of petition*.—Under the statute authorizing the probate court to order a sale of personal property belonging to a decedent's estate, when "liable to waste, or of a perishable nature," (Session Acts, 1853-4, p. 45; Revised Code, § 2067,) it is not essential to the validity of the sale, when collaterally assailed, that the administrator's petition should allege that the sale "would be beneficial to the interests of the estate," though that fact is required to be proved.—*S. C.* 604
10. *Same; same*.—An averment in the petition, in such case, that the property "is of a character liable to waste, or be consumed by fire," is a substantial compliance with the requisitions of the statute, and is sufficient to sustain the jurisdiction of the court to order the sale.—*S. C.* 604
11. *Division of estate by consent*.—The heirs-at-law and distributees of an intestate's estate may divide all the property among themselves by agreement, without any administration on the estate, if there are no debts, or if the debts have been paid; and in like manner,

ESTATES OF DECEDENTS—CONTINUED.

- where there is a will, the parties interested, being adults, may divide the property among themselves by agreement, without probating the will; and the effect of such agreement and division, in each case, is to invest each distributee with a complete equitable title to the property allotted to him.—*Carter v. Owens*. 217
12. *Partial distribution; form of decrees*.—On partial distribution of a decedent's estate, a separate decree should be rendered in favor of each distributee who applies for it; and a decree for the wife's distributive share should be rendered in favor of husband and wife, for the use of the wife. Yet, if a joint decree is rendered against the administrator, in favor of the several distributees, for the sums ascertained to be due to them respectively; and a decree for the wife's distributive share is rendered in favor of the husband, "in right of the wife, and for her use,"—these are mere irregularities, which will be considered on error as amended.—*Harrison's Adm'r v. Meadors and Wife*. 274
13. *Same; same*.—On an application by a distributee, for partial distribution, under section 1778 of the Code, it is error to render a decree in favor of another distributee, who did not join in the application; but the rule is different, when the application is made by the administrator himself.—*S. C.*. 274
14. *Same; notice to administrator*.—The case of *Brazeale's Adm'r v. Brazeale's Distributees*, (9 Ala. 491,) as to the necessity of notice to the administrator of the time when a final decree of partial distribution will be rendered against him, is overruled, in effect, by the case of *Allman v. Owen*, (31 Ala. 167,) and is hereby expressly declared to be overruled on that point; the correct rule being, that from the service of process, until the rendition of the final judgment or decree, the parties are presumed to be in court, and need no special notice of any order made in the cause.—*S. C.*. 274

See, also, EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

1. *En pais; by declaration*.—If an agent, having authority to collect or transfer a judgment belonging to his principal, makes a written assignment of it to himself, his declaration to his principal, made at the time of remitting the money, to the effect that the judgment was paid, does not estop him, on a subsequent motion by the defendant to enter satisfaction of the judgment, from showing that the transaction was really intended by him at the time, not as a payment, but as a transfer of the judgment.—*Eastern Bank of Alabama v. Taylor*. 93
2. *Same; by delivery under invalid contract*.—If the vendor of a chattel receives payment of the purchase-money, and delivers possession of the property to the purchaser, he can not be heard, in a court of law, to assert the invalidity of the contract as a ground of recovery, whether such invalidity arises from the illegality of the consideration, or from the legal incapacity of the purchaser to make the contract.—*Morris v. Hall*. 510

EVIDENCE.

I ADMISSIBILITY AND RELEVANCY.

1. *On question of damages, in detinue.*—The fact that the plaintiff in detinue, having obtained the possession of the property in controversy by executing the statutory bond, (Code, § 2192,) afterwards sold the property under the mortgage which was the foundation of his title, and that the defendant became the purchaser at the sale, and received the property under his purchase, is not competent evidence for the plaintiff, under the plea of the general issue, for the purpose of mitigating the defendant's damages.—*Foster v. Chamberlain & Co.*..... 158
2. *Proof of outstanding title.*—Where the plaintiff in detinue, never having had actual possession, is driven to proof of his title to sustain the action, the defendant may defeat a recovery by proof of a superior outstanding title in a third person, without connecting himself with it.—*S. C.*..... 158
3. *Action against common carrier; proof of quantity or value of lost goods.*—In an action against a railroad company, as a common carrier, to recover the value of several bales of cotton which were destroyed by fire, it is permissible for the plaintiff to prove the weight of all the bales which were contained in his shipment, and of those which were delivered to the consignee, in order to enable the jury to ascertain the weight of the bales which were destroyed; and the admission of evidence showing the weight of the bales which were delivered, without first proving the weight of all the bales, is, at most, error without injury, when the record shows that the other evidence was subsequently adduced.—*Montgomery & West Point Railroad Co. v. Edmonds.*..... 667
4. *Same; proof of value of car burned.*—In such a case, the defendant can not be allowed to adduce evidence of the value of the car on which the cotton was laden, and which was also burned with the cotton.—*S. C.*..... 667
5. *Same; proof of conductor's skill.*—In such action, the defendant can not be allowed to adduce evidence of skill on the part of the conductor, who had charge of the train at the time of the loss, unless the plaintiff has first introduced proof of unskillfulness on his part. *S. C.*..... 667
6. *Proof of criminal acts not charged.*—Where the question of identity or intent is involved, or where it is necessary to show a guilty knowledge on the part of the prisoner, evidence may be received of other criminal acts than those charged in the indictment.—*Farborough v. The State.*..... 405
7. *Redundant evidence.*—Evidence which simply tends to prove an admitted fact in the case, or a fact which, under the pleadings, the law presumes, is redundant, and the court is not bound to receive it.—*Cowan v. Cooper.*..... 187
8. *Same.*—The admission of redundant evidence is, at most, error without injury.—*Jemison & Sloan v. Dearing's Executors.*..... 283
9. *Evidence admissible against one defendant only.*—An order of the court, admitting one of several defendants in ejectment to defend as landlord, does not deprive the plaintiff of the right to introduce

EVIDENCE—CONTINUED.

evidence on the trial which is competent only against the other defendants : the landlord may protect himself against the effect of such evidence, by a request for appropriate instructions to the jury.
Russell v. Erwin's Adm'r...... 292

II ADMISSIONS, DECLARATIONS, RES GESTÆ, &C.

10. *Trial of right of property ; admissibility of defendant's declarations, as evidence against claimant.*—The conduct and declarations of the defendant in attachment, subsequent to the levy of the attachment and to the transfer to the claimant, and not accompanying or explaining any material fact in the case, are not competent evidence against the claimant.—*Pulliam, Wills, Rankin & Co. v. Newberry's Adm'r.*..... 168
 11. *Same ; defendant's and claimant's declarations, as evidence for claimant.*—The declarations of the defendant in attachment and the claimant, made prior to the levy of the plaintiff's attachment, in the presence of a witness who was called in by them to take an account of the stock of goods in controversy, and tending to show a sale of the goods by the defendant to the claimant, are competent evidence for the claimant.—*S. C.*..... 168
 12. *Settlement of guardian's accounts ; admissibility of guardian's declaration, as part of res gestæ.*—The declaration of a guardian, made at the time of lending out money in his hands, that it belonged to his ward's estate, is competent evidence for him, on settlement of his accounts, as tending to prove that fact.—*Beasley and Wife v. Watson.*..... 234
 13. *Declarations in criminal case, tending to show implied admission of guilt.*—Any conduct on the part of the defendant, in reference to the prosecution pending against him, which tends to authorize the implication of an admission of guilt by him, is competent evidence against him ; as where one of his bail suggested to him that he might risk a liability on his bond for six months longer, and possibly compromise it if necessary, and he replied, "Do as you see fit."—*Huggins v. The State.*..... 393
- As to the conclusiveness of declarations, as constituting an estoppel *en pais*, *vide infra*, 20.

III BURDEN, WEIGHT, AND SUFFICIENCY.

14. *Burden of proof as to consideration of contract.*—In an action on a written contract, the writing itself imports a consideration, (Code, § 2278,) and if the consideration is impeached by plea, the *onus* is on the defendant.—*Cowan v. Cooper.*..... 187
15. *Same, as to liability of partner on promissory note executed in partnership name.*—A promissory note, executed by one partner, during the existence of the partnership, and in the name of the partnership, is, *prima facie*, binding on the other partners, and throws on them the *onus* of disproving their liability ; and this principle is applicable to limited partnerships.—*Jemison & Sloan v. Dearing's Executors.*..... 283

EVIDENCE—CONTINUED.

16. *Same, as to value of ward's services, when claimed as set-off against guardian.*—If the ward claims a set-off against her guardian's charge for board, on account of valuable services rendered to him, the onus of proof as to the value of those services is on her.—*Calhoun v. Calhoun*..... 369
17. *Same, on trial of issue of non est factum.*—On the trial of an issue before the probate court, between the distributees and the administrator of an intestate's estate, respecting the genuineness of the intestate's signature to a promissory note, payable to the administrator, which the administrator claims as a credit on the doctrine of retainer, the burden of proof is on him, as on the plaintiff in an action at law; and, as in other civil cases, a mere preponderance of evidence does not necessarily entitle him to a verdict.—*Kirksey v. Kirksey*..... 626
18. *Proof of plaintiff's debt, on trial of right of property.*—As between the plaintiff in attachment and a claimant under purchase from the defendant, the attachment itself is sufficient proof of the plaintiff's debt against the defendant.—*Pulliam, Wills, Rankin & Co. v. Newberry's Adm'r*..... 169
19. *Proof of venue in criminal case.*—The appellate court will not pass on the sufficiency of the proof of venue in criminal case, where no question was raised in the court below in reference to it.—*Huggins v. The State*..... 393
20. *Conclusiveness of declarations.*—If an agent, having authority to collect or transfer a judgment belonging to his principal, makes a written assignment of it to himself, his declaration to his principal, made at the time of remitting the money, to the effect that the judgment was paid, does not estop him, on a subsequent motion by the defendant to enter satisfaction of the judgment, from showing that the transaction was really intended by him at the time, not as a payment, but as a transfer of the judgment.—*Eastern Bank of Alabama v. Taylor*..... 93

IV. MATTERS JUDICIALLY KNOWN.

21. *Abolition of slavery.*—The courts are bound to take judicial notice of the fact, that slavery ceased to exist in Alabama prior to the spring of 1866.—*Glover v. Taylor & Co.*..... 124
Also, *Rose v. Pearson*..... 687
22. *Terms of courts.*—The appellate court will take judicial notice of the day fixed by law for the commencement of the regular terms of the probate court; but, since the term is not confined by law to a single day, nor to any certain number of days, it can not be judicially known when any particular term ends.—*Harrison's Adm'r v. Meadors and Wife*..... 274
23. *Private banking-house.*—The courts can not judicially know that the *Montgomery Insurance Company* is a banking-house.—*Winter v. Cox*..... 207

EVIDENCE—CONTINUED.

V. OBJECTIONS.

24. *To evidence competent against one of several defendants.*—An order of the court, admitting one of several defendants in ejectment to defend as landlord, does not deprive the plaintiff of the right to introduce evidence on the trial which is competent only against the other defendants: the landlord may protect himself against the effect of such evidence, by a request for appropriate instructions to the jury.—*Russell v. Erwin's Adm'r*. 292
25. *To evidence prima-facie incompetent.*—The admission of evidence which is, *prima facie*, incompetent, without the aid of other preliminary proof, is, at most, error without injury, when the record shows that the necessary preliminary proof was afterwards introduced.—*Montgomery & West Point Railroad Co. v. Edmonds*. 667
26. *To redundant evidence.*—The admission of redundant evidence, against the objection of a party, is, at most, error without injury.—*Jemison & Sloan v. Dearing's Executors*. 283
27. *Same.*—The court is not bound to receive redundant evidence.—*Cowan v. Cooper*. 187
28. *Error without injury, in admission of illegal evidence.*—Where the bill of exceptions purports to set out all the evidence, and shows that the plaintiff was not entitled to recover, the admission of illegal evidence, against his objection, is, at most, error without injury.—*Hawkins' Adm'r v. Dumas*. 391

VI. OPINION; EXPERTS.

29. *Comparison of handwriting.*—As to proof of handwriting by comparison, the following general rules may be laid down, as the result of the authorities: 1st, that it is not allowable for either witnesses or juries to compare the handwriting of papers not in evidence for other purposes, with the disputed writing or signature, with the view of arriving at a conclusion as to the genuineness of the latter; 2d, that there is no difference, in this respect, between the competency of an expert and of a person who has never seen the party write; 3d, that the jury may institute a comparison between the disputed writing or signature and other writings or signatures which are proved to be genuine, and which are in evidence before them for other purposes, in order to arrive at a conclusion as to the genuineness of the former; and, 4th, that the doctrine as to experts, in such cases, “relates to ancient writings, which are not proved by their antiquity, and to giving their opinion as to the genuineness of a signature or writing, founded on a knowledge of the handwriting of the party by whom it is said to be written; or, in the case of bank-bills, on a knowledge of the genuineness of bills of a similar character, and some skill and experience possessed by the witness in detecting counterfeits, which are not possessed by the mass of men; and, perhaps, to an opinion as to whether a signature is genuine or counterfeit, without having an acquaintance with the handwriting in dispute, but not by comparison.”—*Kirksey v. Kirksey*. 626
30. *Proof of handwriting.*—Where a witness is competent to testify

EVIDENCE—CONTINUED.

- to handwriting, and it is permissible to question him as to the genuineness of a signature, a part of the signature may be concealed from him, and he may be asked in whose handwriting the part shown him is.—*S. C.* 626
31. *To what witness may testify.*—In an action against a railroad company, as a common carrier, to recover damages for the loss of cotton burned on its cars, a witness for the defendant can not be allowed to testify "that every thing was done, which could have been done, to save the cotton from being burned."—*Montgomery & West Point Railroad Co. v. Eliaonds* 667
32. *When witness may testify as to mental capacity.*—A witness who "was intimate with the deceased, was a relative, and had stayed at his house for some time;" and a witness who "had known the deceased intimately for two years before his death, and was with him every day or two for a while before his death;" are both competent to testify as to the mental capacity of the deceased about the time of his death.—*Stuckey v. Bellah* 700

VII. PAROL AND WRITTEN.

33. *Admissibility of parol to affect consideration of writing.*—In an action on a written contract, by which the defendant promised to pay the plaintiffs a specified sum of money, "to be void if any of them shall put in any plea or defense to prevent the probating" of a certain will, it is permissible for the defendant to prove, by parol, that "in addition to the consideration specified in said writing, it was understood and agreed at the time of the execution of said contract, and before the defendant would sign the same, that she was not to be sued, nor disturbed in any way by the plaintiffs, about the property given to her by the said will."—*Cowan v. Cooper* 187
34. *Same, to explain certificate of deposit.*—When a certificate of deposit has been taken by a guardian in his own name, parol evidence is admissible to show that the funds deposited belonged in fact to the estate of his ward; and that fact being shown by parol, the certificate is admissible as evidence for him, in connection therewith, to prove the investment.—*Beasley and Wife v. Watson* 234
35. *Same, to vary written lease.*—Parol evidence is admissible to show that a written lease, which purports on its face to have been made by an administrator in his own name, was in fact made for the benefit of the estate.—*Russell v. Erwin's Adm'r* 292
36. *Same, under ordinance of September 28, 1865, to show consideration of Confederate contracts, and agreement for discharge.*—In an action by an endorsee, against the drawer of a bill of exchange, or bank-check, which was drawn by a bank in Mobile, on a bank in New Orleans, in August, 1862, (after the capture of New Orleans by the Federal forces,) "payable in currency," and which was not presented to the drawee until after the close of the late war; it is permissible for the defendant, under the provisions of the third section of the ordinance (No. 26) adopted on the 28th September, 1865, to prove "that it was understood and agreed between the bank and said B. [payee], at the time of drawing the bill, that, if it could not be

EVIDENCE—CONTINUED.

- sent to New Orleans in a short time, it should be returned to the bank, and the same amount of money that B. had paid for it, which was Confederate treasury-notes, should be returned to him ;” and evidence which tends to show that, at the time the plaintiff purchased the bill, this agreement was communicated to him by the payee, is also competent and admissible for the defendant. (BYRD, J., *dissenting.*)—*Tarleton v. Southern Bank of Alabama*. 722
37. *Same.*—This ordinance, so far as it admits parol evidence to show the consideration of written contracts, and parol agreements for their discharge in Confederate money, only changes a rule of evidence, as the legislative power might lawfully do, and is not violative of the obligation of contracts.—*S. C.* 722
- Also, *Kirtland v. Molton*. 548
- Scheible v. Bacho*. 423
38. *Same.*—A bill in chancery, for redemption under a mortgage, is within the provisions of the ordinance.—*Scheible v. Bacho*. 423

VIII. PRIMARY AND SECONDARY.

39. *Predicate for secondary evidence.*—To authorize secondary evidence of the contents of a written contract, which was in the possession of the prosecutor’s agent or overseer, the testimony of said agent, to the effect that, “at the close of the year, he assorted his papers, and destroyed such as he regarded of no value ; that he had frequently looked over his papers, and had not lately seen this contract ; that he had never looked for it, and had no recollection that it was destroyed, though he was satisfied that it was, as he had not seen it for some time in looking over his papers for other objects,”—is not a sufficient predicate.—*Green v. The State*. 419
40. *Proof of insolvency.*—In trover against an administrator individually, for the conversion of chattels which he claims as assets of his intestate’s estate, he can not be allowed to prove that the estate is in fact insolvent, when it has not been declared insolvent.—*Stuckey v. Bellah*. 700

IX. VARIANCE.

41. *In action on note.*—Under a complaint, in the form prescribed by the Code, for an action “by payee against maker,” (p. 551,) charging the defendants as joint makers of a promissory note, a recovery may be had on proof of a note signed by them as partners, or executed by one of them, during the existence of the partnership, and in the partnership name.—*Jemison & Sloan v. Dearing’s Executors*. 283
42. *In description of offense in criminal case.*—Under an indictment for buying or receiving stolen property, (Code, §§ 3178, 3182 ; Revised Code, § 3710,) a conviction cannot be had on proof of concealing, or aiding in the concealment of the property ; yet the court may properly refuse to instruct the jury, at the instance of the defendant, “that, although he may have concealed, or aided in the concealment of the property, knowing it to have been stolen, they cannot find him guilty as charged in the indictment,” since

EVIDENCE—CONTINUED.

- such charge does not negative the buying or receiving.—*Huggins v. The State*..... 393
43. *Same; ownership of property*.—When the ownership of the stolen property is laid in three persons as executors, a conviction can not be had on proof that the ownership was in two of them only. *Parmer v. The State*..... 416
- As to variance in chancery cases, see CHANCERY, 17, 18, 19.

EXECUTION.

1. *Exemption of homestead from levy and sale under execution*.—A house and lot, which are not in the actual possession of the defendant in execution, but are rented out, are not exempt from levy and sale under execution against him, under the statute (Code, § 2462) which exempts the homestead.—*Kaster v. McWilliams*..... 302
2. *On forfeited bonds in detinue cases, and under 3d section of "stay law" of February 8, 1861*.—Where the complaint in an action of detinue, instituted in April, 1861, is in the form prescribed by the Code, (p. 552,) "for the recovery of chattels in specie;" while the forthcoming bond taken from the defendant, instead of being conditioned as required by section 2192 of the Code, is drawn in pursuance of the provisions of the third section of the act approved February 8, 1861, commonly called the "stay law," (Session Acts, 1861, p. 4,) there is no statute which gives to the bond, when returned forfeited, the force and effect of a judgment, or authorizes the issue of an execution on it.—*Rose v. Pearson*..... 253
3. *Constitutionality of "stay law" of 1861, prohibiting issue of executions on judgments*.—The fifth section of the act approved December 10, 1861, (entitled "An act to regulate judicial proceedings," and commonly known as the "stay law,") which prohibited the issue of an execution on a judgment, without the written consent of the defendant, until the expiration of twelve months from the ratification of a treaty of peace between the United States and the Confederate States, was unconstitutional and void, whether tested by the constitution of the United States, or by that of the Confederate States.—*Hudspeth & Co. v. Davis*..... 389

EXECUTORS AND ADMINISTRATORS.

1. *Waiver of right to administration, and premature grant of letters*.—A grant of letters of administration, made before the expiration of forty days from the death of the testator or intestate, (Code, §§ 1662-3, 1669,) though premature, will not be set aside on that account, on the application of a person who had a prior right to the grant of letters, when the record shows that no application for the grant of letters was made by him, or by any other person having a prior right, within the time prescribed by law.—*Sowell v. Sowell's Adm'r*..... 359
2. *Appointment of general administrator*.—In an action brought by the general administrator of Mobile county, it is not necessary that the order appointing him should affirmatively show that he was nomi-

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- nated and recommended for the office by the court of county commissioners, as required by the act approved December 14, 1859: the probate court being a court of general jurisdiction as to such matters, every reasonable intendment will be made in favor of the regularity of its proceedings, when collaterally assailed.—*Russell v. Erwin's Adm'r*..... 292
3. *Same; resignation*.—A recital in the order appointing such general administrator, that the preceding general administrator had “duly resigned,” coupled with such appointment, is sufficient, in a collateral proceeding, to show that the resignation had been accepted by the court, as required by the act approved December 12, 1857.—*S. C.*..... 292
4. *When administrator may sue*.—In this State, the administrator of a solvent estate may maintain ejectment, or a real action in the nature of an action of ejectment, for the land of the intestate.—*S. C.* 292
5. *Revivor of action by*.—An action brought by the general administrator of a county, who afterwards resigns, may be revived, (Code, § 1925,) in the name of the succeeding general administrator; and if the revivor is made without objection on the part of the defendants, they can not raise any objection to it at a subsequent term.—*S. C.*..... 292
6. *Same*.—Under section 2146 of the Code, as under former statutes, if one of two defendants in detinue dies pending the suit, the action can not be revived, at the instance of his personal representative and the surviving defendant, so as to proceed against them jointly.—*Foster v. Chamberlain & Co.*..... 158
7. *Devise to executors, in trust to sell and divide proceeds, creates personal trust, and not official duty*.—A devise to executors, “hereinafter named, for the use and benefit of” specified legatees, in trust to sell, with special directions as to the terms of sale, and to divide the proceeds of sale, when collected, among the legatees, creates in the executors a personal trust only, and does not impose on them an official or executorial duty; consequently, the sureties on their official bond as executors are not responsible for their failure to pay over the proceeds of sale according to the directions of the will.—*Perkins v. Lewis*..... 649
8. *Right of retainer by administrator*.—An administrator has a right to retain assets, in payment of a debt due to him from the intestate; and is entitled to a credit on final settlement, for the amount of such debt, on such proof as would authorize a recovery on the debt, in an action against the intestate, if living.—*Kirksey v. Kirksey*..... 626
9. *Presumption of retainer, and consequent extinguishment of debt from intestate*.—Where the husband, at his death, was indebted to the wife for moneys belonging to her statutory separate estate; and she administered on his estate, and received, as such administratrix, personal assets more than sufficient to pay her debt, which were susceptible of conversion into money by sale, and which she retained in specie for six or seven years,—*held*, that the payment and extinguishment of the debt would be presumed, and that the ad-

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- ministratrix was entitled, on a final settlement of her accounts, to a credit for the amount of the debt.—*Glenn v. Glenn*..... 571
10. *Receipt of Confederate treasury-notes by administrator.*—*Held*, on the authority of *Watson and Wife v. Stone*, (40 Ala. 451,) and subsequent decisions of this court, that under the provisions of the act approved 9th November, 1861, (Session Acts, p. 53,) an administrator was authorized to receive Confederate States treasury-notes in payment of debts due the estate, and for property sold under orders of the court; and that he was entitled to a credit, on final settlement, for the amount of such notes remaining in his hands. (BYRD, J., dissenting.)—*Harris v. Parker*..... 604
11. *Receipt of Confederate treasury-notes, and conversion thereof.*—An administrator, having received Confederate States treasury-notes for the estate, after the passage of the act approved on the 9th November, 1861, (Session Acts, p. 53,) and having subsequently converted such notes to his own use, is chargeable on final settlement of his accounts, not with their nominal value, but with their actual value in lawful currency at the time of such conversion.—*Glenn v. Glenn*..... 571
12. *Investment by administrator in Confederate States bonds.*—*Held*, on the authority of *Dockery v. McDowell*, (40 Ala. 476,) *Watson v. Stone*, (40 Ala. 441,) and *DeJarnette v. DeJarnette*, (at the present term,) that the administratrix in this case was properly refused a credit for certificates of deposit in four-per-cent. bonds of the Confederate States, which she had taken in her own name, and which she never reported to the probate court.—*S. C.*..... 571
13. *Keeping estate together without order of court; liability of administrator for wood sold and used.*—If an administratrix keeps together her intestate's estate, without an order of court, and the distributees elect to charge her with the proceeds of the crops raised on the plantation, she can not be charged with the value of the timber cut and used for fuel for herself and the infant distributees, who were her children; *secus*, as to timber cut and sold.—*S. C.*..... 571
14. *Sale of decedent's stock of goods by administrator.*—To authorize the sale of a decedent's stock of goods under the provisions of the act of February 5, 1858, (Revised Code, § 2074,) it must be affirmatively shown that he "was engaged in mercantile business in this State;" and where neither the petition nor the recitals of the court show this fact, the order of sale is void, and the administrator is chargeable as for a conversion of the goods.—*Harris v. Parker*.... 604
15. *Private sale by administrator, under order of probate court.*—*Semble*, that under the provisions of the Code, a private sale of property by an administrator is unauthorized, except in the particular cases specially provided for. But, when the jurisdiction of the probate court to order the sale has attached, by the filing of a petition containing the essential averments, the order of sale is not void, because it directs the sale to be made privately, as asked in the petition; nor is the sale, made in obedience to such order, void.—*S. C.* 604
16. *Validity of such sale, as affected by administrator becoming purchaser.*—The fact that an administrator has a secret interest in the pur-

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- chase of cotton, sold by him under an order of the probate court which is not void, while it may furnish a reason for setting aside the sale on a direct application, does not render it absolutely void.
S. C. 604
17. *Same, as affected by allowance of credit, instead of requiring cash.*—The fact that the administrator, in such case, takes from the purchaser a note, with sureties, (instead of requiring cash, according to the terms of the order of sale,) which note is made payable to the mother and guardian of the infant distributees, by and with her approbation, and is received by her as cash, does not render the sale void.—*S. C.* 604
18. *Same, as affected by interests of estate, and conduct of administrator personally.*—The validity of the sale, in such case, is not affected by the fact that, viewed in the light of subsequent events, it does not now appear to have been beneficial to the interests of the estate; nor by the fact that, at the time he applied for the order and sold the cotton under it, the administrator was buying cotton for himself; nor does that fact prove bad faith on the part of the administrator in asking the order.—*S. C.* 604
19. *Liability of administrator for willful conversion, and loss by negligence.*—For an intentional conversion of the assets of the estate, an administrator may be charged on final settlement, as a tortfeasor, with their highest value; but, for a loss by negligence merely, he is only chargeable with the value of the goods at the time of their loss, and interest thereon.—*S. C.* 604
20. *Liability for unauthorized payment.*—*Held*, that the administrator in this case was not entitled to a credit for money which he had collected from the maker of a note held by the intestate, and which he afterwards refunded, on proof that the debtor had once handed the money to a clerk in the intestate's store, with instructions to have it credited on the note, and that the credit never was entered; there being no proof of the clerk's authority to receive the money, and he being solvent.—*S. C.* 604
21. *Liability for negligence.*—An administrator should be charged, on final settlement, "in every case in which the estate has been injured, or a debt has been lost, by his failure to sue upon the same within a reasonable time."—*S. C.* 604
22. *Same.*—Where the administrator and his intestate were both stockholders in an insurance company, which was dissolved by resolution, after the death of the intestate, and the assets distributed among the stockholders, the administrator is not chargeable with the assets received by him on such division, unless it is shown that they were delivered to him in satisfaction of his intestate's interest; but he would be chargeable with any loss to the estate, resulting from his failure to prosecute his intestate's right to a share of the assets.—*S. C.* 604
23. *Compensation of administrators.*—Section 1825 of the Code, which relates to the compensation of executors and administrators, applies to and includes special administrators; and the word *receipts*, as used in said section, means pecuniary assets only, and does not

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- embrace the other property which may come to the hands of the personal representative.—*Wright's Adm'r v. Wilkerson*..... 267
24. *Same*.—An executor or administrator cannot, on final settlement of his accounts, claim the allowance of a gross sum for his services, but must specify the items for which he claims compensation, as in chancery cases, and adduce proof of the value of his services in connection with each item.—*S. C.*..... 267
25. *Same*.—Only willful default, or gross negligence, resulting in loss to the estate, (neither of which is shown in this case,) will deprive an administrator of the right to commissions as fixed by law.—*Harris v. Parker*..... 604
26. *Allowance of counsel fees*.—An administrator is entitled to an allowance, on final settlement, for reasonable counsel fees paid by him, for services rendered, except in the maintenance of improper contests with the distributees.—*S. C.*..... 604
27. *Same*.—The probate court has no authority, on final settlement of an administrator's accounts, to render a decree in favor of his attorney and solicitor, for the value of his professional services rendered to the administrator.—*Wright's Adm'r v. Wilkerson*..... 267
28. *Notice of partial settlement*.—The case of *Brazeale's Adm'r v. Brazeale's Distributees*, (9 Ala. 491,) as to the necessity of notice to the administrator of the time when a final decree of partial distribution will be rendered against him, is overruled, in effect, by the case of *Allman v. Owen*, (31 Ala. 167,) and is hereby expressly declared to be overruled on that point; the correct rule being, that from the service of process, until the rendition of the final judgment or decree, the parties are presumed to be in court, and need no special notice of any order made in the cause.—*Harrison's Adm'r v. Meadors and Wife*..... 274
29. *Jurisdiction of probate court to settle administration, where administrator occupies antagonistic positions*.—If an administrator dies without having made final settlement of his accounts and vouchers, and his executor is appointed administrator *de bonis non* of his intestate's estate, the probate court has no jurisdiction to settle with such executor his testator's administration of the intestate's estate; nor can the difficulty be obviated by appointing a special administrator, under the provisions of the act of 1863, (Session Acts, 1863, p. 65,) to represent the intestate's estate: the only remedy is in chancery.—*Hays v. Cockrell*..... 75
30. *Presumption of settlement after lapse of twenty years*.—In the absence of special circumstances, an administrator may be called to a final settlement of his accounts and vouchers at the expiration of eighteen months from his appointment; and if the parties interested in the estate suffer twenty years after that time to elapse, without taking any steps to compel a settlement, the lapse of time raises a presumption of settlement, and is fatal to any relief.—*Ragland's Executors v. Morton*..... 344

See, also, ESTATES OF DECEDENTS,

EXEMPTION.

See EXECUTION, 1.

INSOLVENT ESTATES, 3.

FRAUD.

1. *What constitutes.*—A misrepresentation as to a matter of law does not, ordinarily, constitute a fraud; nor does a misrepresentation as to a matter of fact, concerning which the party complaining ought to have been informed at least as well as the opposite party, and where no relation existed between them which justified him in relying on the representations of the other party without inquiry.—*Steamboat Belfast v. Boon & Co.*..... 51

FRAUDS, STATUTE OF.

1. *Specific performance of parol contract for sale of lands.*—A parol contract for the sale of lands is not taken out of the operation of the statute of frauds, on the ground of partial performance, where the facts relied on, as constituting a part payment of the purchase-money, simply show that the purchaser furnished to the company present, “as a treat,” five drinks of liquor, which were worth at the time five dollars in Confederate currency, and the contract itself did not require any cash payment.—*Hart v. McMillan*..... 251
2. *Validity of conveyance on valuable consideration, with intent to defraud creditors.*—To sustain a sale or conveyance as against creditors of the grantor or vendor, it must not only be made on valuable consideration, but must also be *bona fide*: if there is an actual intent between the parties to hinder, delay, or defraud other creditors, the existence of a just debt, or other valuable consideration, is not sufficient to uphold the transaction.—*Pulliam, Wills, Rankin & Co. v. Newberry's Adm'r*..... 168
3. *Validity of mortgage as against creditors.*—A mortgage, which is executed with the avowed intent on the part of the mortgagor to prevent a levy on the property by his judgment creditors, and accepted by the mortgagee with knowledge of that intent, and which purports to secure a debt partly simulated, is fraudulent and void as against creditors.—*Hall, Moses & Roberts v. Heydon*..... 242

FRAUDULENT CONVEYANCES.

See FRAUDS, STATUTE OF, 2, 3.

GARNISHMENT.

1. *Liability of municipal corporation to garnishment.*—Under the provisions of the act approved February 22, 1866, (Revised Code, § 2895,) process of garnishment lies against a municipal corporation, to subject the wages or salary of a policeman to the satisfaction of a judgment obtained against him.—*City Council of Montgomery v. Van Dorn*..... 505
2. *Answer of such corporation.*—Under the provisions of this statute, the answer of the corporation is not required to be under its corporate seal, but may be made by the treasurer, upon whom the garnishment is served.—*S. C.*..... 505

GARNISHMENT—CONTINUED.

3. *Liability of trustee or mortgagee as garnishee.*—Section 2523 of the Code, relative to the liability of trustees to process of garnishment, equally applies to mortgagees with power of sale; and under its provisions, if such trustee or mortgagee is guilty of actual fraud, (as by accepting the deed with knowledge of a fraudulent intent on the part of the grantor or mortgagor,) he cannot, as against an attaching creditor, retain out of the assets the amount of a debt due to himself.—*Hall, Moses & Roberts v. Heydon.* 242

GUARDIAN AND WARD.

1. *Ex-parte statement of account against non-resident guardian.*—To sustain an *ex-parte* settlement of a guardian's accounts and vouchers, on the ground that he has removed from the State without making a settlement, (Code, § 2038,) the record must affirmatively show the fact of removal, and a compliance with the requisitions of the statute as to the publication of notice against him. A recital in the order directing the publication of notice, that it appeared to the court, "from an inspection of the petition," that the guardian had removed from the State, is not sufficient proof of the fact of removal, when the petition is not under oath; and a recital in the final decree, that it appeared to the court, "from satisfactory proof, that said guardian has had notice, by publication and otherwise, and as directed in the former order of this court," is not sufficient proof of publication, when the former order does not specify the length of time the notice is to be published.—*Bogia v. Darden and Wife.* 322
2. *Investment by guardian in Confederate States bonds.*—A guardian is entitled to a credit, on final settlement of his accounts, for the amount of money belonging to his ward's estate, which he had invested, in good faith, in Confederate States bonds, under the authority conferred by the act approved November 9, 1861; and his failure to report such investment to the probate court within sixty days, as required by the fourth section of said act, does not deprive him of the right to a credit for such investment, when it is not shown that injury resulted to the ward's estate from such failure; nor is the failure to charge himself in his account-current, as at first made out, with usurious interest collected on a loan of his ward's money, sufficient proof of a general fraudulent intent on his part in the management of the estate, to deprive him of the right to such credit on the ground of bad faith. (BYRD, J., dissenting.)—*Bentley and Wife v. Watson.* 234
3. *Admissibility of guardian's declaration, as part of testa.*—The declaration of a guardian, made at the time of lending out money in his hands, that it belonged to his ward's estate, is competent evidence for him, on settlement of his accounts, as tending to prove that fact.—*S. C.* 234
4. *Admissibility of parol evidence to explain certificate of deposit.*—When a certificate of deposit has been taken by a guardian in his own name, parol evidence is admissible to show that the funds deposited

GUARDIAN AND WARD—CONTINUED.

- belonged in fact to the estate of his ward ; and that fact being shown by parol, the certificate is admissible evidence for him, in connection therewith, to prove the investment.—*S. C.*..... 234
- But see this case explained, in *De Jarnette v. De Jarnette*..... 708
5. *Allowance to guardian, for board paid to ward's father*.—Where a father is not able to support and educate his children, during their minority, in a manner suitable to their circumstances in life, an allowance will be made to him, for that purpose, out of a child's private estate ; and, where board is paid to the father, by the child's guardian, the guardian will be allowed a credit for the amount so paid, if reasonable, on proof that it was demanded by the father, and that the father's circumstances justified the demand.—*S. C.*... 234
6. *Allowance for necessary expenses of ward*.—Where the annual income of the ward's property, or the legal interest on the money which comprises her estate, is not sufficient for her support and maintenance, the guardian may nevertheless expend a reasonable sum for her support and education ; and if the charges for those items are necessary and reasonable, such as a court of chancery would sanction, he should be allowed a credit for them on settlement in the probate court.—*Calhoun v. Calhoun*..... 369
7. *Set-off for ward's services to guardian, and burden of proof as to value thereof*.—If the ward renders valuable services to the guardian, while residing with him, she is entitled to set off the value of those services, against his charge for board ; but the *onus* of proof as to the value of such services is on the ward.—*S. C.*..... 369
8. *Liability of guardian for compound interest*.—A guardian is not chargeable with compound interest, on settlement of his accounts, unless he has been guilty of such gross neglect as is evidence of fraud ; and the mere failure to make annual settlements is not such gross neglect.—*S. C.*..... 369
9. *Competency of guardian as witness for himself*.—Prior to the passage of the act approved February 14, 1867, relative to the competency of witnesses, (Session Acts, 1866-67 p. 435,) a guardian could not testify generally for himself, on final settlement of his accounts, though he might establish by his own oath the correctness of any item under twenty dollars.—*Padgett v. Padgett*..... 382

HANDWRITING.

See EVIDENCE, 29, 30.

HUSBAND AND WIFE.

1. *Husband's interest in wife's personality*.—At common law, where an estate in personality vested in the wife under a will, and became a legal interest by the consent of the executor, and went into the possession of the person in whom was vested the precedent particular estate, and no adverse possession was shown, such estate passed to the husband by virtue of his marital rights ; but the wife's distributive share of an intestate's estate did not vest in the husband, unless he reduced it to his possession before the death of the wife.—*Walker's Adm'r v. Walker's Adm'r*..... 353

HUSBAND AND WIFE—CONTINUED.

2. *Wife's statutory separate estate; when wife may sue alone.*—A promissory note, assets of an intestate's estate, being allotted to one of the distributees who is a married woman, on a division of the estate by agreement among the parties interested, becomes a part of her statutory separate estate; and she may sue in her own name on it, (Code, § 2131,) without joining her husband.—*Curter v. Owens.* 217
3. *Husband's right to emblements, and jurisdiction of probate court to settle his trusteeship of his wife's statutory separate estate.*—The cases of *Weems v. Bryan and Wife.* (21 Ala. 302,) as to the jurisdiction of the probate court to settle the husband's trusteeship of his wife's statutory separate estate, and as to his right to the proceeds of the crop planted but not gathered at the termination of the coverture, and *Bennett v. Bennett,* (34 Ala. 53,) as to the latter point, both overruled.—*Hays v. Cockrell.*..... 75
See, also, *DOWER.*

INSOLVENT ESTATES.

1. *Rejection of claim against estate; re-hearing discretionary.*—It is discretionary with the probate court, having rejected a claim filed against an estate which has been reported, but not decreed insolvent, to grant a re-hearing as to the rejected claim, at the instance of the creditor by whom it was filed, after the issue of insolvency *vel non* has been argued and submitted for decision, but before the decision thereon has been pronounced, and to order it to be reinstated as a claim against the estate.—*Wills & Hobbs v. Rand's Adm'r* 198
2. *Proof of payments by administrator.*—On the trial of an issue as to the insolvency of an intestate's estate, between the administrator and contesting creditors, the validity of payments made by the administrator not being strictly within the issue, the same fullness of proof is not required, as when those payments are presented for final adjudication on their merits; nor can the contesting creditors complain, on error, that the administrator was not required to prove those payments otherwise than by the production of the receipts, when the record shows that the ruling of the court, even if erroneous, was without injury to them, if not beneficial, by increasing the assets of the estate.—*S. C.* 198
3. *Exemption of homestead for widow and family of insolvent decedent.* By section 1738 of the Code, and the acts amendatory thereof, approved respectively on the 30th January, 1860, (Session Acts, 1859-60, p. 18,) and the 9th December, 1864, (Session Acts, 1864, p. 93,) a permanent homestead, or its value in money, is secured to the widow and family of a decedent whose estate is insolvent; and the fact that the widow's dower in the lands has been allotted to her, is no bar to her application for the benefit of the statute.—*Chisolm v. Chisolm's Executors.*..... 327
4. *Proof of insolvency.*—In trover against an administrator individually, for the conversion of chattels which he claims as assets of his intestate's estate, he can not be allowed to prove that the estate is in fact insolvent, when it has not been declared insolvent.—*Stuckey v. Bellah* 700

INTERNATIONAL LAW.

See CONSTITUTIONAL LAW, 9-12.

JUDGES.

See CONSTITUTIONAL LAW, 5.

JUDGMENTS AND DECREES.

1. *Form of judgment, in detinue.*—In detinue for slaves, (or in the analogous action prescribed by the Code, p. 552, "for the recovery of chattels in specie,") the action having been commenced before the abolition of slavery, a judgment, on verdict, may be rendered for the plaintiff, for the slaves or their alternate value, notwithstanding the abolition of slavery before the trial. (BYRD, J., not concurring.)
Rose v. Pearson..... 687
2. *Same.*—In an action for the recovery of slaves, brought by a mortgagee, judgment on verdict having been rendered for the plaintiff, since the abolition of slavery, for the slaves or their alternate value; an entry in the judgment, made at the instance of the plaintiff, to the effect that "this judgment is to be discharged on the payment of" the balance due on the mortgage debt, as ascertained by the verdict of the jury, is, at most, error without injury.—*S. C.*..... 687
3. *Conclusiveness of probate decree.*—On motion to enter satisfaction of a probate decree, and to supersede an execution issued thereon, no matter can be brought forward, which is antecedent to, and involved in the decree.—*Shackleford v. Cunningham*..... 203
4. *Payment and satisfaction of probate decree.*—A decree having been rendered against a guardian, on final settlement of his accounts, in January, 1864, for the balance ascertained to be then in his hands, as so much money, he can not have satisfaction of that decree entered, on proof that he paid the amount of the decree, in Confederate States treasury-notes, to the probate judge, after the refusal of the ward to receive them, and took from said judge a receipt, which stated that the notes so paid were to be held by him "until the question is decided, whether S. D." [the ward] "is bound to take them or not."—*S. C.*..... 203
5. *Payment of judgment to clerk.*—The clerk of a court, in which a judgment has been rendered, has statutory authority to receive payment, (Code, § 651 ; Revised Code, § 771,) and to enter satisfaction thereof ; but he can only receive money, such as the plaintiff is bound to accept, and has no authority to receive depreciated paper currency : consequently, the reception by such clerk, in October, 1864, of treasury-notes of the Confederate States and of the State of Alabama, was unauthorized, and did not discharge the judgment. (Overruling *Haynes v. Wheat & Fennell*, 9 Ala. 239.)—*Aicardi v. Robbins*..... 541
6. *Payment to sheriff.*—A sheriff has no authority to receive the money due on a judgment, except when he has an execution in his hands ; and his receipt of the money without such authority neither discharges the judgment, nor imposes any liability on his sureties ; yet, if he pays over the money to the plaintiff's attorneys of record, and it is received by them in satisfaction of the judgment, the debt

JUDGMENTS AND DECREES—CONTINUED.

- is thereby discharged, if the payment was made in lawful money.
Chapman, Lyon & Noyes v. Cowles. 103
7. *Payment to attorney, of depreciated paper currency.*—An attorney-at-law has no authority to receive depreciated paper currency, in payment of a judgment; and if he does so receive it, his client may either proceed against him individually, thereby ratifying the payment, or may proceed against the debtor.—*S. C.* 103
8. *Payment and transfer.*—If a bank agent, having authority to collect or transfer its judgments, makes a written assignment of one of its judgments to himself, and remits to his principal the money due on it, this does not, of itself, amount to a payment or satisfaction of the judgment, as in favor of the defendant; but it is a question for the jury to decide, whether the transaction was intended as a payment and satisfaction, or as a transfer. If a transfer, and not a payment of the judgment, was really intended by the agent, no loose declarations on his part, or on the part of his principal, would convert it into a payment; and if a payment was really intended by him at the time, the character of the transaction could not be changed, as against the defendant, by any subsequent conduct on the part of the agent or his principal.—*Eastern Bank of Alabama v. Tylor* 93
9. *Lien.*—In a contest among several judgment creditors, respecting the application of money on their several executions, the case being tried on an agreed statement of facts, and it not being shown whether the defendant in execution acquired the property before the rendition of the judgments, the issue of the executions, or the repeal of the acts of 1861 and 1863, the court can not allow a superior lien to the senior judgments.—*Kirksey v. Hardaway* 338
19. *Ratification of judgments by ordinance of State convention.*—The ratification of judgments rendered during the war, by the ordinance of the State convention adopted on the 28th of September, 1865, (Ordinance No. 26,) “relieves them from any objection which might be taken to them on the ground that, at the time of their rendition, the State was in a position of open hostility and war with the Federal government.”—*Randolph v. Baldwin*. 305

JURISDICTION.

1. *Admiralty; State and Federal.*—A demand for supplies furnished, in the port of Mobile, to a steamboat which is regularly licensed under the laws of the United States, enrolled at the custom-house in Mobile, and plying between that city and Columbus, Mississippi, and which belongs to a resident citizen of Mississippi, is a maritime contract, and can only be enforced, by admiralty process against the boat, in the Federal courts.—*Steamboat Mist v. Martin, Cowen & Co.* 712
2. *Same.*—Neither the constitutional grant to the United States of judicial power in “all cases of admiralty and maritime jurisdiction,” (art. III, § 2,) nor any of the acts of congress which have been passed to carry that grant into effect, takes away from the several States the right to create or declare a statutory lien in favor of a

JURISDICTION—CONTINUED.

shipper, for the loss of his goods, on a vessel navigating an interior river above tide-water, and to authorize the enforcement of that lien in a State court, by a proceeding in the nature of a libel in admiralty; the suit being brought in the State in which the contract of affreightment was made, and in which are situated both the place at which the goods were shipped, and the place at which they were to be delivered. (A. J. WALKER, C. J., *dissenting*.)—*Steamboat Belfast v. Boon & Co.*..... 50

3. *Criminal jurisdiction of justice of the peace.*—Under section 384 of the Penal Code, (Revised Code, § 3932,) a justice of the peace has jurisdiction of larceny, concurrently with the circuit court, where the value of the stolen property is less than ten dollars; and this jurisdiction is not taken away, or affected, by the acts approved respectively on the 7th December, 1866, and the 31st January, 1867, (Session Acts, 1866-7, pp. 115, 306,) which repealed the two acts approved on the 20th January, 1866, (Session Acts, 1865-6, pp. 118, 119,) conferring jurisdiction in criminal cases on justices of the peace, and regulating proceedings before them.—*Ex parte Hixon*..... 410

4. *Jurisdiction of probate court to settle administration, where administrator occupies antagonistic positions.*—If an administrator dies without having made final settlement of his accounts and vouchers, and his executor is appointed administrator *de bonis non* of his intestate's estate, the probate court has no jurisdiction to settle with such executor his testator's administration of the intestate's estate; nor can the difficulty be obviated by appointing a special administrator, under the provisions of the act of 1863, (Session Acts, 1863, p. 65,) to represent the intestate's estate: the only remedy is in chancery.—*Hays v. Cockrell*..... 75

5. *Jurisdiction of probate court to settle husband's trusteeship of wife's statutory separate estate.*—The case of *Weems v. Bryan and Wife*, (21 Ala. 302,) as to the jurisdiction of the probate court to settle the husband's trusteeship of his wife's statutory separate estate, overruled.—*S. C.*..... 75

See, also, ESTATES OF DECEDENTS, 1-6.

JURORS AND JURY.

1. *On trial of issue before probate court.*—There is no statute now in existence in this State, which authorizes the probate court to empanel a jury to try an issue of *non est factum*, when it arises on the final settlement of an administrator's accounts.—*Kirksey v. Kirksey*..... 626
2. *Organization of grand jury.*—In a criminal case, the record must affirmatively show the organization of the grand jury; and an endorsement on an indictment, which purports to be signed by the foreman of the grand jury, is not sufficient proof of that fact.—*Parmer v. The State*..... 416

JUSTICE OF THE PEACE.

1. *Criminal jurisdiction of.*—Under section 384 of the Penal Code,

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(Revised Code, § 3932,) a justice of the peace has jurisdiction of larceny, concurrently with the circuit court, where the value of the stolen property is less than ten dollars; and this jurisdiction is not taken away, or affected, by the acts approved respectively on the 7th December, 1866, and 31st January, 1867, (Session Acts, 1866-7, pp. 115, 306,) which repealed the two acts approved on the 20th January, 1866, (Session Acts, 1865-6, pp. 118, 119,) conferring jurisdiction in criminal cases on justices of the peace, and regulating proceedings before them.—*Ex parte Nixon*..... 410

LANDLORD AND TENANT.

1. *Admission of landlord to defend ejectment*.—An order of the court, admitting one of several defendants in ejectment to defend as landlord, does not deprive the plaintiff of the right to introduce evidence on the trial which is competent only against the other defendants: the landlord may protect himself against the effect of such evidence, by a request for appropriate instructions to the jury. *Russell v. Erwin's Admr.*..... 292
2. *Admissibility of parol evidence to affect written lease*.—Parol evidence is admissible to show that a written lease, which purports on its face to have been made by an administrator in his own name, was in fact made for the benefit of the estate.—*S. C.*..... 292

LEGACY AND DEVISE.

See EXECUTORS AND ADMINISTRATORS.

LIEN.

1. *Of judgment*.—In a contest among several judgment creditors, respecting the application of money on their several executions, the case being tried on an agreed statement of facts, and it not being shown whether the defendant in execution acquired the property before the rendition of the judgments, the issue of the executions, or the repeal of the acts of 1861 and 1863, the court can not allow a superior lien to the senior judgments.—*Kirksey v. Hardaway*..... 338

LIMITATIONS, STATUTE OF.

1. *Removal of bar by partial payment*.—A partial payment, by one of several joint debtors, before the statute of limitations has effected a bar, does not prevent the perfecting of the statutory bar as to the others; and this principle applies to a partial payment on a promissory note, executed by the partner who makes such payment, after the dissolution of the partnership, in the partnership name.—*Myatts & Moore v. Bell*..... 222
2. *Pleading in equity*.—The lapse of time, or the statute of limitations, is available as a defense in equity on demurrer; and if there are any special circumstances, which bring the case within any exception to the general rule, they must be averred in the bill, or by way of special replication to a plea.—*Ragland's Executors v. Morton*..... 344

LIMITATIONS, STATUTE OF—CONTINUED.

3. *Presumption of settlement after lapse of twenty years.*—In the absence of special circumstances, an administrator may be called to a final settlement of his accounts and vouchers at the expiration of eighteen months from his appointment; and if the parties interested in the estate suffer twenty years after that time to elapse, without taking any steps to compel a settlement, the lapse of time raises a presumption of settlement, and is fatal to any relief.—*S. C* 344

MANDAMUS.

1. *Lies when.*—The courts will not grant a *mandamus*, to compel the performance of an official act by a public officer, except where the party applying for the writ has no other adequate and specific remedy.—*Chisholm v. McGehee*..... 192

MORTGAGE.

1. *Registration of mortgage on vessel.*—Under the act of congress approved July 19, 1850, (Brightly's Digest, 833, § 44,) a mortgage of any vessel of the United States, to be valid against subsequent purchasers without notice from the mortgagor, must be recorded in the custom-house where such vessel is registered or enrolled; and a registration in the office of the probate judge of the county is neither actual nor constructive notice.—*Foster v. Chamberlain & Co* 158
2. *Construction of stipulation in mortgage, as to terms of payment.*—A provision in a mortgage, reserving to the mortgagor "the right to pay all, or any part of said indebtedness, at any time during the present year (1863), in current paper funds," does not restrict him to a single payment of the entire amount due, but authorizes partial payments at different times during the year; and such payments might be made, under that stipulation, in treasury-notes of the Confederate States, notwithstanding their great depreciation.—*Stalworth v. Blum*..... 319
3. *Validity.*—A mortgage, which is executed with the avowed intent on the part of the mortgagor to prevent a levy on the property by his judgment creditors, and accepted by the mortgagee with knowledge of that intent, and which purports to secure a debt partly simulated, is fraudulent and void as against creditors.—*Hall, Moses & Roberts v. Heydon*..... 242
4. *Liability of mortgagee as garnishee.*—Section 2523 of the Code, relative to the liability of trustees to process of garnishment, equally applies to mortgagees with power of sale; and under its provisions, if such trustee or mortgagee is guilty of actual fraud, (as by accepting the deed with knowledge of a fraudulent intent on the part of the grantor or mortgagor,) he cannot, as against an attaching creditor, retain out of the assets the amount of a debt due to himself.—*S. C.*..... 242
5. *Redemption; tender.*—A mortgagor, asking a redemption, cancellation of the mortgage, &c., on the ground of a tender made and refused, must pay into court, at the time of filing his bill, the amount of money admitted to be due, and make an appropriate averment in his bill as to such payment; otherwise, his bill is without equity.—*Daughdrill v. Sweeney*..... 310

NEW TRIAL.

See RE-HEARING AT LAW.

OFFICE AND OFFICER.

1. *Special deputy of sheriff is mere agent, and not officer.*—A special deputy, "employed in particular cases" by a sheriff, is the mere agent of his principal in the particular case, and is not an officer within the meaning of the term as used in the constitution.—*Kavanaugh v. The State*..... 399
2. *Right to office; how tried.*—When the final certificate, appended to a transcript, purports to be signed by the probate judge of the county, the transcript will not be struck from the files on motion, on the ground that the officer giving it is not in fact the probate judge; the right to an office cannot be determined on such a motion.—*Harris' Heirs v. Harris' Adm'r*..... 364
3. *Salt commissioner; compensation of, and how paid.*—The act approved December 9, 1862, providing for the appointment of a salt commissioner by the governor, and fixing his compensation, (Session Acts, 1862, p. 5,) while it appropriates one hundred thousand dollars, "out of any money in the treasury not otherwise appropriated," to carry out the provisions of the act, does not require that the compensation of the commissioner shall be paid by the warrant of the comptroller on the treasurer.—*Chisholm v. McGehee*..... 192

OVERRULED CASES.

1. *Beasley and Wife v. Watson*, pp. 234-41, explained in *De Jarnette v. De Jarnette*..... 708
2. *Bennett v. Bennett*, 34 Ala. 53, overruled by *Hays v. Cockrell*..... 75
3. *Brazeale's Adm'r v. Brazeale's Distributees*, 9 Ala. 491, overruled by *Harrison's Adm'r v. Meadors and Wife*..... 274
4. *Haynes v. Wheat & Fennell*, 9 Ala. 239, overruled by *Aicardi v. Robbins*..... 541
5. *Weems v. Bryan and Wife*, 21 Ala. 302, overruled by *Hays v. Cockrell* 75

PARENT AND CHILD.

See GUARDIAN AND WARD, 5.

PARTNERSHIP.

1. *Authority of partner, after dissolution, to sign partnership name to note for partnership debt.*—After the dissolution of a partnership, one of the partners has no authority to bind the others, by signing the partnership name to a promissory note, even though such note may be given in renewal of a former note executed by the partnership; and the fact that, on the dissolution, he was authorized by the other partners to settle all the partnership business, does not change or affect this principle.—*Myatts & Moore v. Bell*..... 222
2. *Burden of proof as to liability of partner on promissory note executed in partnership name.*—A promissory note, executed by one partner, during the existence of the partnership, and in the name of the partnership, is, *prima facie*, binding on the other partners, and

PARTNERSHIP—CONTINUED.

throws on them the *onus* of disproving their liability ; and this principle is applicable to limited partnerships.—*Jemison & Sloan v. Dearing's Executors*..... 283

PAYMENT.

1. *Acceptance of note in payment or discharge of debt*.—When a creditor takes a note from one of several joint debtors, he cannot afterwards maintain an action against all of them, on the original indebtedness, without producing the note at the trial, if it is in his possession, and offering to surrender it ; and this rule also applies, where the action is against several partners, and is founded on a promissory note executed by one of them, in the partnership name, after the dissolution of the partnership, in payment of a partnership debt.—*Myatts & Moore v. Bell*..... 222
2. *Same*.—The giving and accepting of a promissory note do not constitute a payment or discharge of the original indebtedness, unless there is an agreement to that effect ; but, if there are any facts tending to show that it was received in payment, and the jury find that it was in fact so received, a recovery cannot be had on the original debt.—*S. C.*..... 222
3. *Payment and transfer of judgment*.—If a bank agent, having authority to collect or transfer its judgments, makes a written assignment of one of its judgments to himself, and remits to his principal the money due on it, this does not, of itself, amount to a payment or satisfaction of the judgment, as in favor of the defendant ; but it is a question for the jury to decide, whether the transaction was intended as a payment and satisfaction, or as a transfer. If a transfer, and not a payment of the judgment, was really intended by the agent, no loose declarations on his part, or on the part of his principal, would convert it into a payment ; and if a payment was really intended by him at the time, the character of the transaction could not be changed, as against the defendant, by any subsequent conduct on the part of the agent or his principal.—*Eastern Bank of Alabama v. Taylor*..... 93
4. *Payment to sheriff*.—A sheriff has no authority to receive the money due on a judgment, except when he has an execution in his hands ; and his receipt of the money without such authority neither discharges the judgment, nor imposes any liability on his sureties ; yet, if he pays over the money to the plaintiff's attorneys of record, and it is received by them in satisfaction of the judgment, the debt is thereby discharged, if the payment was made in lawful money.—*Chapman, Lyon & Noyes v. Cowles*..... 103
5. *Payment to attorney, of depreciated paper currency*.—An attorney-at-law has no authority to receive depreciated paper currency, in payment of a judgment : and if he does so receive it, his client may either proceed against him individually, thereby ratifying the payment, or may proceed against the debtor.—*S. C.*..... 103
6. *Payment of judgment to clerk*.—The clerk of a court, in which a judgment has been rendered, has statutory authority to receive pay-

PAYMENT—CONTINUED.

- ment, (Code, § 651 ; Revised Code, § 771,) and to enter satisfaction thereof ; but he can only receive money, such as the plaintiff is bound to accept, and has no authority to receive depreciated paper currency : consequently, the reception by such clerk, in October, 1864, of treasury-notes of the Confederate States and of the State of Alabama, was unauthorized, and did not discharge the judgment.—(Overruling *Haynes v. Wheat & Fennell*, 9 Ala. 239.)—*Aicardi v. Robbins*..... 541
7. *Payment and satisfaction of probate decree*.—A decree having been rendered against a guardian, on final settlement of his accounts, in January, 1864, for the balance ascertained to be then in his hands, as so much money, he can not have satisfaction of that decree entered, on proof that he paid the amount of the decree, in Confederate States treasury-notes, to the probate judge, after the refusal of the ward to receive them, and took from said judge a receipt, which stated that the notes so paid were to be held by him “until the question is decided, whether S. D.” [the ward] “is bound to take them or not.”—*Shackelford v. Cunningham*..... 203
8. *Presumption of retainer, and consequent extinguishment of debt from intestate*.—Where the husband, at his death, was indebted to the wife for moneys belonging to her statutory separate estate ; and she administered on his estate, and received, as such administratrix, personal assets more than sufficient to pay her debt, which were susceptible of conversion into money by sale, and which she retained in specie for six or seven years,—held, that the payment and extinguishment of the debt would be presumed, and that the administratrix was entitled, on a final settlement of her accounts, to a credit for the amount of the debt.—*Glenn v. Glenn*..... 571

PLEADING AND PRACTICE.

I. PARTIES.

1. *Who is proper party plaintiff*.—A distributee of a decedent's estate, to whom a promissory note, assets of the estate, has been allotted as a part of his share, on a division of the estate by agreement among the parties interested, may maintain an action at law on it (Code, § 2129) in his own name.—*Carter v. Owens*..... 217
2. *When wife may sue alone*.—A promissory note, assets of an intestate's estate, being allotted to one of the distributees who is a married woman, on a division of the estate by agreement among the parties interested, becomes a part of her statutory separate estate ; and she may sue in her own name on it, (Code, § 2131,) without joining her husband.—*S. C.*..... 217

II. COMPLAINT.

3. *Construction and sufficiency of count on note*.—A count on a promissory note, which avers, that the plaintiff claims of the defendant the amount therein specified, “due by promissory note made by him, for the *Winter Iron Works*, payable at the office of the *Montgomery Insurance Company*, to the order of the defendant, and en-

PLEADING AND PRACTICE—CONTINUED.

- dorsed by said defendant; that the said *Winter Iron Works* are insolvent, and were insolvent at the time said note became due and payable,"—is against the defendant as endorser, and not as maker; and it is insufficient to charge him, because it does not show that his liability is to be determined by the commercial law, (since the court can not judicially know that said insurance company is a banking-house,) and does not aver a sufficient excuse for the failure to sue the maker, if the note is not governed by the commercial law.—*Winter v. Coxe*..... 207
4. *Same*.—But a count, which avers, that the note was made by a corporation, "by said defendant as its agent," payable at a banking-house, to the order of the defendant, and by him endorsed to the plaintiff; "and said note not being paid at maturity, the defendant had notice of the non-payment thereof,"—is good and sufficient, as a count against the endorser of a note governed by the commercial law.—*S. C.*..... 207
5. *Same*.—A count, which avers, that the note was made by a corporation, "by said defendant as its agent," payable at a banking-house, to the order of the defendant, and by him endorsed to the plaintiff; that the defendant "was the sole agent of said corporation at the maturity of said note, and no other person was authorized to pay said note for said corporation; wherefore plaintiff avers, that said defendant had due notice of the non-payment of said note at maturity,"—is not sufficient, as a count against the endorser of a note governed by the commercial law, because it does not aver notice of non-payment, nor contain allegations which dispense with the necessity of notice.—*S. C.*..... 207
6. *Action against common carrier, for loss of goods*.—In an action against a common carrier, for a failure to deliver freight, a complaint in the form prescribed by the Code, (p. 553,) except that the plaintiff is not the person who is averred to have been the consignee, and which contains no averment of ownership in the plaintiff, is not sufficient on demurrer.—*Montgomery & West Point Railroad Co. v. Edmonds*..... 667

III. DEMURRER.

7. *Specification of causes of demurrer*.—Where a demurrer to a petition for re-hearing after final judgment at law is overruled by the primary court, and the record does not show what causes of demurrer, if any, were assigned, (Code, § 2253,) the appellate court will not consider the sufficiency of the petition, but will presume that no causes of demurrer were in fact assigned, or that none were well assigned.—*Harrison v. Nolin*..... 256

REAL ACTIONS.

1. *When administrator may sue*.—In this State, the administrator of a solvent estate may maintain ejectment, or a real action in the nature of an action of ejectment, for the land of the intestate.—*Russell v. Erwin's Adm'r*..... 292
2. *Admission of landlord to defend*.—An order of the court, admitting

REAL ACTIONS—CONTINUED.

one of several defendants in ejectment to defend as landlord, does not deprive the plaintiff of the right to introduce evidence on the trial which is competent only against the other defendants: the landlord may protect himself against the effect of such evidence, by a request for appropriate instructions to the jury.—*S. C.*..... 292

RE-HEARING AT LAW.

1. *Demurrer to petition: specification of grounds of demurrer.*—Where a demurrer to a petition for a re-hearing after final judgment at law is overruled by the primary court, and the record does not show what causes of demurrer, if any, were assigned, (Code, § 2253,) the appellate court will not consider the sufficiency of the petition, but will presume that no causes of demurrer were in fact assigned, or that none were well assigned.—*Harrison v. Nolin*..... 256
2. *When order granting re-hearing is revisable.*—When the record does not set out the evidence, on which the court below granted a re-hearing after final judgment, (Code, § 2408,) the appellate court can not revise its action.—*S. C.*..... 256
3. *When appeal lies.*—The action of the primary courts in granting or refusing a new trial under the ordinance of the State convention adopted on the 28th September, 1865, (No. 26,) unlike their action on a petition for re-hearing under the Code, (§§ 2407–17,) will not support an appeal.—*Ketchum and Wife v. Dennis and Wife*..... 183

SALT COMMISSIONER.

See OFFICE AND OFFICER, 3.

SHERIFF.

1. *Special deputy is agent, and not officer.*—A special deputy, “employed in particular cases” by a sheriff, is the mere agent of his principal in the particular case, and is not an officer within the meaning of the term as used in the constitution.—*Kavanaugh v. The State*..... 399
2. *Payment of judgment to sheriff.*—A sheriff has no authority to receive the money due on a judgment, except when he has an execution in his hands; and his receipt of the money without such authority neither discharges the judgment, nor imposes any liability on his sureties; yet, if he pays over the money to the plaintiff’s attorneys of record, and it is received by them in satisfaction of the judgment, the debt is thereby discharged, if the payment was made in lawful money.—*Chapman, Lyon & Noyes v. Cowles*..... 103
3. *Amendment of return.*—On motion to suppress the deposition of a witness before the commencement of the trial, on account of the failure to give notice of the filing of the interrogatories, the sheriff may amend his return, so as to show that notice was in fact given; and the return being thus amended, the motion to suppress may be overruled, although the return does not show when the notice was given, nor that it was given ten days before the deposition was taken.—*Stuckey v. Bellah*..... 701

SLAVES.

See BONDS, 2.

CHANCERY, 2, 3, 4.

EVIDENCE, 21.

SURETIES.

See WITNESS, 1.

TAXATION.

See CONSTITUTIONAL LAW, 19, 20, 21.

TRIAL OF THE RIGHT OF PROPERTY.

1. *Proof of plaintiff's debt.*—As between the plaintiff in attachment and a claimant under purchase from the defendant, the attachment itself is sufficient proof of the plaintiff's debt against the defendant.—*Pulliam, Wills, Rankin & Co. v. Newberry's Adm'r.*..... 168
2. *Admissibility of defendant's declarations, as evidence against claimant.*—The conduct and declarations of the defendant in attachment, subsequent to the levy of the attachment and to the transfer to the claimant, and not accompanying or explaining any material fact in the case, are not competent evidence against the claimant.—*S. C.* 168
3. *Admissibility of defendant's and claimant's declarations, as evidence for claimant.*—The declarations of the defendant in attachment and the claimant, made prior to the levy of the plaintiff's attachment, in the presence of a witness who was called in by them to take an account of the stock of goods in controversy, and tending to show a sale of the goods by the defendant to the claimant, are competent evidence for the claimant.—*S. C.*..... 168

TROVER.

1. *When action lies against stranger replevying attached property, and what defenses he may make.*—When attached property is replevied by a stranger, for the defendant, (Code, § 2536; Revised Code, § 2964,) and the person so replevying is sued in trover, he may set up any defense that would be available to the defendant in attachment; and if he so replevies the property in good faith, without any knowledge or notice of the title of the real owner, and afterwards holds in subordination to the bailment, and does no act inconsistent with his duty as such bailee, he is not liable in trover.—*Morris v. Hall.*..... 510

TRUSTS.

1. *Liability of trustee to garnishment.*—Section 2523 of the Code, relative to the liability of trustees to process of garnishment, equally applies to mortgagees with power of sale; and under its provisions, if such trustee or mortgagee is guilty of actual fraud, (as by accepting the deed with knowledge of a fraudulent intent on the part of the grantor or mortgagor,) he cannot, as against an attaching creditor, retain out of the assets the amount of a debt due to himself.—*Hall, Moses & Roberts v. Heydon.*..... 242

TRUSTS—CONTINUED.

2. *Purchase by trustee at his own sale.*—A trustee, under a deed of trust for the benefit of creditors, may become the purchaser at his own sale; but such purchase and sale may be set aside, on the timely application of the beneficiaries in the deed.—*Carter v. Thompson*..... 375
3. *Same.*—A purchase by a trustee or mortgagee, at his own sale, is not void, but voidable only, at the instance of the *cestui que trust* or mortgagor, expressed within a reasonable time; and under the circumstances of this case, (the bill not having been filed until after the lapse of more than four years and a half,) the delay was held fatal to the relief sought.—*Robinson v. Cullom & Co.*..... 693
4. *Commingling of trust funds and individual funds by trustee.*—If a trustee lends the trust funds, and takes a note and mortgage to himself individually, he thereby mingles the trust funds with his own individual funds, and may be charged with a *devastavit* at the election of the *cestuis que trust*. (The case of *Beasley and Wife v. Watson*, ante, pp. 234–41, explained.)—*De Jarnette v. De Jarnette*.. 708
5. *Devise to executors, in trust to sell and divide proceeds, creates personal trust, and not official duty.*—A devise to executors, “hereinafter named, for the use and benefit of” specified legatees, in trust to sell, with special directions as to the terms of sale, and to divide the proceeds of sale, when collected, among the legatees, creates in the executors a personal trust only, and does not impose on them an official or executorial duty; consequently, the sureties on their official bond as executors are not responsible for their failure to pay over the proceeds of sale according to the directions of the will.—*Perkins v. Lewis*..... 649
6. *Parol voluntary trust in slaves enforced against purchaser with notice.* Where slaves are conveyed by a father to his reputed daughter, in consideration of natural love and affection, by deed of gift absolute on its face, but under a parol trust that the grantee shall, within a specified time, convey them to her children, the trust may be enforced in equity, at the instance of the children, after the death of the grantor, against one who purchased from the grantee with notice of the trust.—*Jone's Adm'r v. Shaddock*..... 262
7. *Liability of such implied trustee.*—The purchaser in such case, if he allows the slaves to hire their own time, and acquire money or property for themselves, is not bound to assert title to such acquisitions; yet, if he does assert title thereto, he holds such acquisitions for the benefit of the *cestuis que trust*, and is chargeable with the same at their instance.—*S. C.*..... 262
8. *Same.*—If he sells a negro to one of the slaves held by him under such trust, and receives in payment money arising from the slave's earnings, the title to the negro so sold does not thereby pass from him, but he holds the money subject to the trust.—*S. C.*..... 262

VENDOR AND PURCHASER.

1. *Title-bond of deceased vendor; Tennessee statute of 1794.*—The provision in the Tennessee statute of 1794, which declares that an executor or administrator “shall not be bound to make title” to lands

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sold by the decedent in his life-time, "until the bond or obligation of the decedent shall have been recorded in the county in which the land lies," &c., relates merely to the remedy for the enforcement of the contract, and, therefore, constitutes no defense to an action here for a breach of such title-bond; but the subsequent provision of that statute—"nor shall the holders of such obligations charge any real estate of such decedent, until they shall have produced a copy of the same, duly authenticated," &c.—affects the validity of the obligation, and a failure to comply with it is a defense to such action.—*Swink's Adm'r v. Dechard*..... 258

2. *Esoppel by delivery under invalid contract*.—If the vendor of a chattel receives payment of the purchase-money, and delivers possession of the property to the purchaser, he can not be heard, in a court of law, to assert the invalidity of the contract as a ground of recovery, whether such invalidity arises from the illegality of the consideration, or from the legal incapacity of the purchaser to make the contract.—*Morris v. Hall*..... 510

VENUE.

See CRIMINAL LAW, 17, 19.

VERDICT.

See CRIMINAL LAW, 8.
DETINUE, 7.

WILLS.

1. *Devise to executors, in trust to sell and divide proceeds, creates personal trust, and not official duty*.—A devise to executors, "hereinafter named, for the use and benefit of" specified legatees, in trust to sell, with special directions as to the terms of sale, and to divide the proceeds of sale, when collected, among the legatees, creates in the executors a personal trust only, and does not impose on them an official or executorial duty; consequently, the sureties on their official bonds as executors are not responsible for their failure to pay over the proceeds of sale according to the directions of the will.—*Perkins v. Lewis*..... 649
2. *Notice of probate*.—On an application to revoke and set aside the probate of a will, on the ground that notice was not given to the parties, who were by law entitled to notice, if the record shows that the court ordered notice to be given "as the law directs," and the decree admitting the will to probate recites, that notice was given "in pursuance of law, and in strict accordance with the former order of the court";—these recitals, if no evidence is introduced to contradict them, will be held sufficient to sustain the probate.—*Sowell v. Sowell's Adm'r*..... 359
3. *Necessity of probate*.—A party cannot deduce title to personal property under a will, without proof of its probate.—*Hawkins' Adm'r v. Dumas*..... 391
4. *Probate not presumed from certified copy of recorded will*.—Neither the probate of a will, nor even the death of the testator, can be pre-

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sumed by the court from the certificate of the probate judge, appended to a transcript from the records of his court, to the effect "that the foregoing is a correct copy of the will now on file" in his office.—*S. U.*..... 391

WITNESS.

1. *Competency of discharged surety as witness for principal.*—The use on a replevin bond for the delivery of slaves, having under the charge from liability on the bond by the abolition of said after fore forfeiture, is a competent witness for his principal.—*bold Taylor & Co.*..... 124
2. *Competency of convicted felon, who has been pardoned, as witness.*—A pardon restores the competency of a felon, who has been rendered incompetent as a witness by a conviction of an infamous crime, although it is not affirmatively shown "that the warrant of pardon restored him to the rights of citizenship."—*Yarborough v. The State.* 405
3. *Competency of guardian as witness for himself.*—Prior to the passage of the act approved February 14, 1867, relative to the competency of witnesses, (Session Acts, 1866-67 p. 435,) a guardian could not testify generally for himself, on final settlement of his accounts, though he might establish by his own oath the correctness of any item under twenty dollars.—*Padgett v. Padgett.*..... 382
4. *Competency of parties as witnesses.*—On the trial of an issue before the probate court, between the administrator and the distributees of an intestate's estate, as to the genuineness of the signature to a note, which purports to have been executed by the intestate, payable to the administrator, and which the administrator claims as a credit on the asserted right of retainer; a distributee of the estate, being a party to the proceeding, is not competent as a witness against the administrator. The case falls within the exception to the act approved February 14, 1867, (Revised Code, § 2704,) which exception is in these words: "Except that in suits or proceedings by or against executors or administrators, (as to which a different rule is not made by law,) neither party shall be allowed to testify against the other, as to any transaction with, or statement by the testator or intestate, unless called to testify thereto by the opposite party."—*Kirksey v. Kirksey.*..... 626
5. *Same.*—In trover against an administrator in his individual capacity, for the conversion of a chattel which the plaintiff claims under an alleged parol gift from the intestate in his life-time, and which the defendant holds and claims as assets of his intestate's estate, the plaintiff is not a competent witness to prove the alleged gift to himself. The case falls within the letter and spirit of the exception contained in the act approved February 14, 1867.—*Stuckey v. Bellah.*..... 701
6. *When witness may testify as to mental capacity.*—A witness who "was intimate with the deceased, was a relative, and had stayed at his house for some time;" and a witness who "had known the deceased intimately for two years before his death, and was with him every day or two for a while before his death;" are both competent

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- to testify as to the mental capacity of the deceased about the time of his death.—*S. C.*..... 700
7. *To what witness may testify.*—In an action against a railroad company, as a common carrier, to recover damages for the loss of cotton burned on its cars, a witness for the defendant can not be allowed to testify “that every thing was done, which could have been done, to save the cotton from being burned.”—*Montgomery & West Point Railroad Co. v. Edmonds* 667
8. *Comparison of handwriting.*—As to proof of handwriting by comparison, the following general rules may be laid down, as the result of the authorities : 1st, that it is not allowable for either witnesses or juries to compare the handwriting of papers not in evidence for other purposes, with the disputed writing or signature, with the view of arriving at a conclusion as to the genuineness of the latter ; 2d, that there is no difference, in this respect, between the competency of an expert and of a person who has never seen the party write ; 3d, that the jury may institute a comparison between the disputed writing or signature and other writings or signatures which are proved to be genuine, and which are in evidence before them for other purposes, in order to arrive at a conclusion as to the genuineness of the former ; and, 4th, that the doctrine as to experts, in such cases, “relates to ancient writings, which are not proved by their antiquity, and to giving their opinion as to the genuineness of a signature or writing, founded on a knowledge of the handwriting of the party by whom it is said to be written ; or, in the case of bank-bills, on a knowledge of the genuineness of bills of a similar character, and some skill and experience possessed by the witness in detecting counterfeits, which are not possessed by the mass of men ; and, perhaps, to an opinion as to whether a signature is genuine or counterfeit, without having an acquaintance with the handwriting in dispute, but not by comparison.”—*Kirksey v. Kirksey*..... 626
9. *Proof of handwriting.*—Where a witness is competent to testify to handwriting, and it is permissible to question him as to the genuineness of a signature, a part of the signature may be concealed from him, and he may be asked in whose handwriting the part shown him is.—*S. C.*..... 626

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